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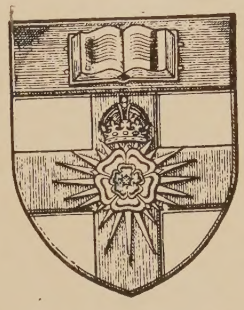

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ERRATA

Page 102, headnote: The references to *In re May* and *In re Mewburn's Settlement* should be [1926] Ch. 136 and [1934] Ch. 112, respectively.

Page 307, para. 2, line 4: For "*Rex* v. *Turner*" read "*Rex* v. *Day*."

Page 382, headnote, line 4: For "N" read "C."

Page 505, headnote: Holding (3) should read: "That the superior or directing authorities of the African subsidiaries could not, therefore, be said to exist in the United Kingdom, and the subsidiaries were not resident there within section 20 (9) of the Finance Act, 1953."

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THE
WEEKLY LAW REPORTS

Volume III

Containing those cases which are intended to be included in The Law Reports.

[CHANCERY DIVISION.]

ALLIANCE BUILDING SOCIETY *v.* PINWILL.

1958
May 21, 23.

Vaisey J.

[1958 A. 245.]

Mortgage—Attornment clause—Notice to quit—Four weeks' notice required by statute to quit premises let as a dwelling—Whether applicable to mortgagor under attornment clause—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 16.

Landlord and Tenant—Rent restriction—Notice to quit—Premises let as a dwelling—Statutory requirement of four weeks' notice—Whether applicable to mortgagor under attornment clause—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 16.

A mortgage in the form of a legal charge contained an attornment clause under which the mortgagor attorned tenant to the mortgagee at a peppercorn rent. The clause also provided that at any time after the power of sale had become exercisable the mortgagee might determine the tenancy thereby created "after giving "to the borrower [the mortgagee] at least seven days' notice to "quit. . . ."

The mortgagor being in default the mortgagee gave the mortgagor ten days' notice to quit the premises. On a summons asking for possession, the question was whether that notice was valid or whether the mortgagee was compelled to give four weeks' notice pursuant to section 16 of the Rent Act, 1957:—

Held, that section 16 protected a real tenant against a real landlord under a real "residential letting," and not a mortgagor against a mortgagee under such a mortgage deed as this; in the circumstances the notice required was that required by the mortgage deed and not that required by section 16.

Ex parte Isherwood (1882) 22 Ch.D. 384; *Portman Building Society* v. *Young* [1951] W.N. 10; [1951] 2 T.L.R. 369; [1951] 1 All E.R. 191 and *Steyning & Littlehampton Building Society* v. *Wilson* [1951] Ch. 1018; [1951] 2 T.L.R. 424; [1951] 2 All E.R. 452 applied.

ADJOURNED SUMMONS.

The mortgagees, the Alliance Building Society, claimed against the mortgagor, Edwin James Pinwill, delivery of possession of

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the mortgaged premises, which consisted of a dwelling-house, No. 390, Radleys, at Marston Green in the county of Warwick. The mortgage was in the form of a legal charge and dated November 1, 1950.

The only possible defence to the claim was whether the attornment clause contained in the mortgage brought the case within section 16 of the Rent Act, 1957.[1] The attornment clause, so far as material, was in the following terms: "(1) The borrower "hereby attorns tenant to the society of such part of the mort- "gaged property as now is or shall at any time during the "continuance of this security (but within twenty-one years from "the date of this charge) be in the occupation of the borrower "at the yearly rent of a peppercorn if demanded. (2) Provided "as follows:—(i) That the society may at any time after their "power of sale has become exercisable enter into and upon the "mortgaged property or any part thereof and determine the "tenancy hereby created after giving to the borrower at least "seven days' notice to quit. . . ."

It was assumed that the mortgaged property had at some time been in the occupation of the mortgagor, though that was not his address as given either in the mortgage itself, or in the notice to quit, or in the summons. It was, however, given as his address in a supplemental deed not otherwise relevant executed by him and dated July 8, 1952. At the present time it appeared that the property was occupied by his wife, who had been invited to attend these proceedings, but had not, in fact, done so.

The mortgagor being in default, the mortgagees, by a written notice dated January 7, 1958, gave him notice to quit the premises on January 17, 1958; that was a notice longer than the seven days required in the attornment clause. The question was whether this notice to quit was invalid as contravening section 16 of the Rent Act, 1957.

John Mills for the mortgagees.

The mortgagor was not represented and did not appear.

Case referred to in argument not cited in the judgment: *Dudley and District Benefit Building Society* v. *Emerson*.[2]

Cur. adv. vult.

May 23. VAISEY J., having stated the facts, read the following judgment: The preamble to the Rent Act, 1957, states that one of its purposes was to provide a minimum length for notice to terminate "residential lettings." This clearly points to section 16.

[1] Rent Act, 1957, s. 16: "No "notice by a landlord or a tenant to "quit any premises let (whether "before or after the commencement "of this Act) as a dwelling shall be "valid unless it is given not less than "four weeks before the date on which "it is to take effect."

[2] [1949] Ch. 707; 65 T.L.R. 444; [1949] 2 All E.R. 252.

The definition clause, section 25, is a remarkable instance of referential legislation, but does not seem to throw any light on the present question. This may be summarized as follows: Do I find in the attornment clause here either a "landlord" or a "tenant" or premises "let as a dwelling-house," within the meaning of section 16? In my judgment I find none of these things, and on the authorities to which I am about to refer, I do not think that I can or should.

It is to be observed that in the Landlord and Tenant Act, 1954, the word "tenancy" is defined as "not including a mort-"gage term or any interest arising in favour of a mortgagor by "his attorning tenant to his mortgagee"; and the absence of any corresponding excepting provision from the Rent Act, 1957, may have some significance, but I confess that I do not know what it is. The draftsman of section 16 ought obviously to have provided for the point in one way or the other, and it is regrettable that with the precedent of the Act of 1954 to guide him he did not do so.

There is, in my judgment, much authority to support the view which I hold that section 16 is inapplicable, and first there is *Ex parte Isherwood*,[1] from which I will read a few words from the headnote as follows: "Notwithstanding the insertion of an "attornment clause in a mortgage deed the real relation between "the parties is that, not of landlord and tenant, but of mortgagee "and mortgagor."

Then there is *Portman Building Society* v. *Young*,[2] in which it was held, in effect, that "there was no relationship of landlord "and tenant between the mortgagor and mortgagee in that case," and I leave out some words, because the Rent Acts dealt only with cases "in which the person in occupation was in the true "sense a tenant of premises 'let' to him by" one "who was, in "ordinary language, the landlord and owner," and not "where "the real relationship was that of mortgagor and mortgagee."

In *Steyning and Littlehampton Building Society* v. *Wilson*[3] it was held that the Agricultural Holdings Act, 1948, could not have been intended to apply to anything other than true transactions between landlord and tenant, and did not apply to tenancies arising by reason of an attornment clause. The provision in section 23 (1) of that Act invalidated a notice to quit if it purported to terminate the tenancy before the expiration of 12 months from the end of the current year. It was held not to apply to a tenancy arising under an attornment clause, and I adopt the observation of Danckwerts J. at the beginning of his judgment where he says[4]: "This is a case which again illustrates "the undesirability of retaining in mortgages an attornment "clause which is entirely obsolete and at the present time per-"forms no useful purpose."

[1] (1882) 22 Ch.D. 384.
[2] [1951] W.N. 10; [1951] 2 T.L.R. 369; [1951] 1 All E.R. 191.
[3] [1951] Ch. 1018; [1951] 2 T.L.R. 424; [1951] 2 All E.R. 452.
[4] [1951] Ch. 1020.

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Vaisey J.

I am, in fact, of opinion that section 16 of the Rent Act, 1957, protects a real tenant against a real landlord under a real "residential letting" and is not intended to, and does not, benefit a mortgagor to the detriment of his mortgagee.

I should add that, although this decision may apply to many cases in which attornment clauses appear in mortgages, but it did not necessarily apply to all of such cases, it might, for instance, be inapplicable to a case where the rent reserved was not a peppercorn but a full rack-rent, or to a case in which the terms of the mortgage obliged the mortgagor to reside personally on the premises.

I hold, therefore, that the mortgagees are entitled to the order which they seek in the present case. The length of notice required is seven days under the mortgage and not four weeks under section 16.

I may, in conclusion, refer to one other case, namely, *Hinckley and Country Building Society* v. *Henny*.[5]

Order accordingly.

Solicitors: *Boxall & Boxall for Cardens, Brighton.*

I. G. R. M.

[5] [1953] 1 W.L.R. 352; [1953] 1 All E.R. 515.

[PRIVY COUNCIL.]

J. C.*

1958
April 23;
June 3.

DON THOMAS SAMARATUNGA . . . Appellant;

AND

THE QUEEN . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Perjury—Summary statutory powers of court—Construction and scope—Summary committal as for contempt—Criminal Procedure Code (*Legislative Enactments of Ceylon*, 1938, *c.* 16), *ss.* 439 (1), 440 (1)—*Penal Code* (*Legislative Enactments of Ceylon*, 1938, *c.* 15), *s.* 188.

By section 440 of the Ceylon Criminal Procedure Code: "(1) If "any person giving evidence . . . in open court in any judicial pro- "ceeding under this Code gives, in the opinion of the court before "which the judicial proceeding is held, false evidence within the "meaning of section 188 of the Penal Code it shall be lawful for "the court, if such court be the Supreme Court, summarily to "sentence such witness as for a contempt of the court to imprison- "ment . . . for any period not exceeding three months . . . ":—

Held, that from its nature the summary power conferred by

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* *Present*: Viscount Simonds, Lord Cohen, Lord Keith of Avonholm, Lord Somervell of Harrow and the Rt. Hon. L. M. D. de Silva.

section 440 (1) is one which should only be used when the judge is, as stated in *Subramaniam* v. *The Queen* [1956] 1 W.L.R. 456 at 460, "clear beyond doubt" that the witness has given false evidence as defined. Subject to that overriding principle, it was correctly stated in *Banda* v. *Sada* (1914) 17 N.L.R. 510 at 512, in relation to the interpretation and scope of the section, that "the legislature "has left the courts quite free as a matter of law to deal under "that section with any form of 'false evidence' within the meaning "of section 188 of the Penal Code, and if we attempt to fetter that "discretion by rigid general rules as to the class of cases in which "it may or may not be exercised, we shall be . . . running the risk "of paralysing the operation of a statutory power, the maintenance "of which in full working order is essential to the administration "of justice in this country . . . and we have every right to consider "ourselves . . . [entitled] to inquire whether this statutory power "can be safely exercised in any particular case."

Chang Hang Kiu v. *Piggott* [1909] A.C. 312; 25 T.L.R. 381 considered.

Subramaniam v. *The Queen* (supra) distinguished.

A commissioner of assize of the Supreme Court of Ceylon, with a view to determining the appropriate sentence to be passed on a man on trial before him who pleaded guilty to a charge under section 439 (1) of the Criminal Procedure Code of having given false evidence in proceedings in which the appellant had been charged with and acquitted of aiding and abetting an attempted murder, himself called the appellant and others as witnesses. The commissioner, having come to the conclusion that the appellant in giving his evidence was deliberately lying, summarily sentenced him to three months' rigorous imprisonment:—

Held, that the commissioner was entitled to act, and had rightly acted, under the summary power conferred by section 440 (1) of the Criminal Procedure Code.

Order of the commissioner of assize (Dr. H. W. Tambiah Q.C.) affirmed.

APPEAL (No. 27 of 1957), by special leave, from an order (June 15, 1957) of Dr. H. W. Tambiah Q.C., commissioner of assize for the Supreme Court of Ceylon, sentencing the appellant to three months' rigorous imprisonment for having given false evidence during the course of a criminal trial. The order was made under the powers conferred by section 440 (1) of the Criminal Procedure Code. That section read as follows: "440.—(1) If any "person giving evidence on any subject in open court in any "judicial proceeding under this Code gives, in the opinion of the "court before which the judicial proceeding is held, false evidence "within the meaning of section 188 of the Penal Code it shall be "lawful for the court, if such court be the Supreme Court, sum-"marily to sentence such witness as for a contempt of the court to "imprisonment either simple or rigorous for any period not "exceeding three months or to fine such witness in any sum not "exceeding two hundred rupees; or if such court be an inferior "court to order such witness to pay a fine not exceeding fifty "rupees and in default of payment of such fine to undergo "rigorous imprisonment for any period not exceeding two months. "Whenever the power given by this section is exercised by a "court other than the Supreme Court the judge or magistrate of

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"such court shall record the reasons for imposing such fine. "(2) Any person who has undergone any sentence of imprisonment or paid any fine imposed under this section shall not be "liable to be punished again for the same offence. (3) Any person "against whom any order is made by any court other than the "Supreme Court under subsection (1) of this section may appeal "to the Supreme Court and every such appeal shall be subject "to the provisions of this Code. (4) In lieu of exercising the "power given by this section the court may if it thinks fit transmit "the record of the judicial proceeding to the Attorney-General "to enable him to exercise the powers conferred on him by this "Code or proceed in manner provided by section 380. (5) Nothing "in this section contained shall be construed as derogating from "or limiting the powers and jurisdiction of the Supreme Court or "the judges thereof."

Section 188 of the Penal Code was as follows: "188. Whoever, "being legally bound by an oath or affirmation, or by any express "provision of law to state the truth, or being bound by law to "make a declaration upon any subject, makes any statement "which is false, and which he either knows or believes to be false, "or does not believe to be true, is said to give 'false evidence.' "Wherever in any Ordinance the word 'perjury' occurs, such "Ordinance shall be read as if the words 'giving false evidence' "were therein used instead of the word 'perjury.' *Explanation* 1. "—A statement is within the meaning of this section whether it "is made verbally or otherwise. *Explanation* 2.—A false statement as to the belief of the person attesting is within the "meaning of this section, and a person may be guilty of giving "false evidence by stating that he believes a thing which he does "not believe, as well as by stating that he knows a thing which "he does not know. Illustrations ....."

In Supreme Court Case No. 10 before the same commissioner, the appellant had been indicted with one Yothan Singho, the latter with attempting to murder one Peiris Singho and the appellant with aiding and abetting. In the non-summary proceedings before the magistrate, one Gunatilleke had given evidence that he was employed by the appellant and that the appellant had given him and Yothan Singho arrack and a club and had directed them to go and kill Peiris Singho.

At the trial Gunatilleke, while continuing to say that he was in the appellant's employment, said that the rest of his evidence as summarized above was fabricated. He said that he had given his earlier evidence at the request of Peiris Singho's wife and that he had been promised Peiris Singho's daughter Kusumawathie in marriage if he gave that false evidence. He produced two documents which he said had been given him by Peiris Singho's wife containing the false evidence.

The case against the appellant had been based on Gunatilleke's evidence as given in the magistrates' court. There was no other evidence against him; the commissioner therefore directed the jury

to acquit the appellant and that was done, the case proceeding against Yothan Singho, who ultimately pleaded guilty.

The commissioner directed the clerk of assize to prepare an indictment against Gunatilleke under section 439 of the Criminal Procedure Code, which read as follows: " 439. (1) If in the course " of a trial in any District Court or of a trial by jury before the " Supreme Court any witness shall on any material point con- " tradict either expressly or by necessary implication the evidence " previously given by him at the inquiry before the Magistrate, it " shall be lawful for the presiding judge, upon the conclusion of " such trial, to have such witness arraigned and tried on an " indictment for intentionally giving false evidence in a stage of " a judicial proceeding. In a trial before the Supreme Court the " indictment shall be prepared and signed by the registrar, and " the accused may be tried by the same jury. In a trial in a " District Court the indictment shall be prepared and signed by " the secretary of such court. (2) At such trial it shall be " sufficient to prove that the accused made the contradictory " statements alleged in the indictment, and it shall not be " necessary to prove which of such statements is false. (3) The " presiding judge may, if he considers expedient, adjourn the trial " of such witness for such period as he may think fit, and may " commit such witness to custody or take bail in his own recog- " nizance or with sureties for his appearance. In the Supreme " Court such adjourned trial shall be before the same or any other " jury as the judge shall direct."

Gunatilleke pleaded guilty. The commissioner wanted to hear evidence with regard to what he called " the background " with a view to deciding on the appropriate sentence. If the statement made to the magistrate was fabricated Gunatilleke had sworn false evidence incriminating an innocent man to further a love affair. If that evidence was true his evidence at the trial might have been due to a desire to shield the appellant, whom everyone had described as his master, as a result of or in hope of some payment. The commissioner might have left Gunatilleke to give or call evidence in mitigation if he so desired. His counsel made various statements on instructions to the effect that his evidence just given at the trial was the truth. The commissioner decided himself to have witnesses called and ordered that Peiris Singho, Punchi Nona his wife, Kusumawathie his daughter, and the appellant should be called. The wife and daughter both denied that they had written the documents produced by Gunatilleke or that there was any truth in his story of his possible marriage with the daughter. The daughter said that Gunatilleke was employed by the appellant.

The appellant then gave evidence, being examined by Crown counsel, and in the course of his examination he was asked a number of questions by the commissioner. The commissioner came to the conclusion that he was deliberately lying, in particular in saying that Gunatilleke had never been his servant, that he did

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not know him, though he had once seen him in the bazaar, and that he did not know his name until he gave evidence against him. It was in respect of that evidence that the sentence appealed from was imposed.

1958. April 22, 23. *Dingle Foot Q.C.*, *Joseph Dean* and *Miss D. Phillips* for the appellant.

T. O. Kellock for the Crown.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Ibrahim* v. *The King* *; *Sivakolunthu* v. *Chelliah* †; *Rex* v. *Amadoru* ‡; *In re Seeman* ‡‡; *Lindula* v. *Silva* §; *In re Samuel Nunoo.*¶

April 23. VISCOUNT SIMONDS announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reasons later.

June 3. The reasons of their Lordships for dismissing the appeal were delivered by LORD SOMERVELL OF HARROW, who stated the facts and statutory provisions set out above and continued: In *Chang Hang Kiu* v. *Piggott* [1] this Board considered an Ordinance of Hong Kong in similar terms to section 440 (1) of the Ceylon Criminal Procedure Code. It was laid down that before an order was made under such a provision the gist of the accusation must be made clear to the witness and he must be given an opportunity of giving reasons against summary measures being taken. The witnesses in that case had not been given such an opportunity and the appeal was allowed. This decision assimilated the procedure to that laid down by the Board for ordinary contempt of court in *In re Pollard.*[2]

It was submitted for the appellant that neither of the above conditions was satisfied. The only basis for this submission was that the nature of the charge which had already been indicated in general terms was particularized with regard to one specific point after the appellant had been clearly given an opportunity to give reasons against summary measures being taken. In their Lordships' opinion this point fails.

It was further submitted that the commissioner had done that which was held to be wrong in *Subramaniam* v. *The Queen.*[3] The appellant in that case was a witness in a murder trial. The trial judge came to the conclusion as the evidence was called that there had been a conspiracy between the accused man, the appellant and the police to suppress evidence. He came to the conclusion that the evidence as given did not justify leaving the case to the jury, whom he directed to bring in a verdict of not guilty. This

* [1914] A.C. 599; 30 T.L.R. 383.
† (1910) 13 N.L.R. 289.
‡ (1911) 14 N.L.R. 481.
‡‡ (1945) 46 N.L.R. 142.
§ (1927) 9 C.L.Recdr. 42.
¶ (1936) 3 W.A.C.A. 74.
[1] [1909] A.C. 312; 25 T.L.R. 381.
[2] (1868) L.R. 2 P.C. 106.
[3] [1956] 1 W.L.R. 456.

was on March 15. Later on that day, and on March 16 and 18, the judge called the appellant and others whom he suspected. The appellant and others were represented by counsel. Medical evidence was called on behalf of one of those suspected. The appellant was sentenced on March 18. There were other unsatisfactory features as appear from the Record, but it was in these circumstances that Lord Oaksey, in delivering the judgment of the Board, used these words [4]: "In their Lordships' opinion the "course taken by the commissioner was misconceived. The summary power conferred by section 440 (1) is one which should "only be used when it is clear beyond doubt that a witness in the "course of his evidence in the case being tried has committed "perjury. It was, in their Lordships' opinion, never intended "that, in the exercise of the power under section 440 (1) in the "course of a criminal trial a subsidiary criminal investigation "should be set on foot not against the prisoner charged but "against the witnesses in the case. If such an investigation is "necessary it can and should be set on foot under section 440 (4)." Nothing of the kind took place in the present appeal. The evidence was given in the course of the trial, in relation to sentence. This point also fails.

The appellant further submitted that the commissioner's discretion had not been judicially exercised and that the case was not a proper one for section 440. Their Lordships have carefully considered the points made subsidiary to the points already considered and are satisfied that there is no substance in them. The commissioner regarded the matter as clear beyond doubt. He saw and heard the witness and there was clearly material on which he could be so satisfied.

Their Lordships were referred to a number of cases in Ceylon in which this section has been considered. In some cases it is said it should not be used where there is a conflict of testimony (see Bonser C.J., in *Andris* v. *Juanis*,[5] *Ahamath* v. *Silva*[6] and *Dassanayake* v. *Excise Inspector, Horana*.[7]

From its nature the power is one which should only be used when the judge is "clear beyond doubt"—to take the words used by Lord Oaksey in *Subramaniam's* case [8]—that the witness has given false evidence as defined. Subject to that overriding principle their Lordships adopt what was said by Wood Renton C.J. in *Banda* v. *Sada*[9]: "The true interpretation of the scope of "section 440 of the Criminal Procedure Code appears to be this. "The legislature has left the courts quite free as a matter of law "to deal under that section with any form of 'false evidence' "within the meaning of section 188 of the Penal Code, and if we "attempt to fetter that discretion by rigid general rules as to the "class of cases in which it may or may not be exercised, we shall "be acting rather in a legislative than in a judicial capacity, and

[4] [1956] 1 W.L.R. 456, 460.
[5] (1896) 2 N.L.R. 74.
[6] (1920) 22 N.L.R. 444.
[7] (1946) 47 N.L.R. 47.
[8] [1956] 1 W.L.R. 456, 460.
[9] (1914) 17 N.L.R. 510, 512.

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" running the risk of paralysing the operation of a statutory power, " the maintenance of which in full working order is essential to " the administration of justice in this country. But there is " ancient and sound authority for the proposition that ' all things " ' that are lawful are not expedient,' and we have every right to " consider ourselves, in the exercise of our original jurisdiction, " and in the exercise of our appellate jurisdiction [entitled] to " inquire whether this statutory power can be safely exercised in " any particular case that has come before us."

Their Lordships regret that the respondent, who successfully opposed the appeal, was not represented for the assistance of the Board when the petition for leave to appeal was heard.

For the reasons which have been stated their Lordships have humbly advised Her Majesty that this appeal be dismissed.

Solicitors: *Graham Page & Co.; T. L. Wilson & Co.*

C. C.

[CHANCERY DIVISION.]

1958
May 8, 9, 13.
Upjohn J.

In re BIRMINGHAM, DECD.
SAVAGE AND ANOTHER *v.* STANNARD AND OTHERS.

Administration of Estates—Payment of debts—Property liable—Purchase money unpaid on house—Specific devise of house—Liability as between devisee and residuary legatees—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 35 (1).[1]

Vendor and Purchaser—Lien of vendor—When charge arises—Contract to purchase dwelling-house—Death of purchaser before completion—Vendor's charge on estate for unpaid purchase money.

On March 31, 1953, a testatrix contracted to buy a freehold house and paid a deposit on the signing of the contract, but she died before completion of the purchase.

By a codicil executed after the signing of the contract the testatrix devised the house free of all duties to her daughter, the first defendant, and, by her will dated September 8, 1952, gave her residuary estate to the second and third defendants. By arrangement between all parties the house was conveyed direct to the first defendant on May 21, 1953.

On a summons to determine how the balance of the purchase

[1] Administration of Estates Act, 1925, s. 35: " (1) Where a person " dies possessed of, or entitled to, or, " under a general power of appoint- " ment (including the statutory power " to dispose of entailed interests) by " his will disposes of, an interest in " property, which at the time of his " death is charged, with the payment " of money, whether by way of legal " mortgage, equitable charge or " otherwise (including a lien for un- " paid purchase money), and the " deceased has not by will deed or " other document signified a contrary " or other intention, the interest so " charged shall, as between the differ- " ent persons claiming through the " deceased, be primarily liable for the " payment of the charge; and every " part of the said interest, according " to its value, shall bear a proportion- " ate part of the charge on the whole " thereof."

money should be borne as between the first defendant and the residuary legatees:—

Held, (1) that a vendor's charge for unpaid purchase money arose immediately upon the execution of the contract of sale; therefore, the vendor had a lien upon the house for the unpaid balance of the purchase money at the date of death of the testatrix.

Dictum of Sir George Jessel M.R. in *Lysaght* v. *Edwards* (1876) 2 Ch.D. 499 applied.

Kettlewell v. *Watson* (1884) 26 Ch.D. 501 explained.

(2) That the specific gift of the house by the codicil did not indicate a "contrary or other intention" within section 35 (1) of the Administration of Estates Act, 1925,[1] so that the liability for the unpaid purchase money fell on the devisee.

(3) That the solicitors' charges in respect of the purchase must be borne by residue.

ADJOURNED SUMMONS.

By her will, dated September 8, 1952, the testatrix, Daisy Teresa Birmingham, gave the residue of her estate to the second and third defendants, St. Dunstan's and the Imperial Cancer Research Fund. By a first codicil dated January 2, 1953, she gave an immediate legacy of £10,000 to her daughter, the first defendant.

On March 31, 1953, the testatrix contracted to buy a freehold house, No. 9, Friar's Crescent, Brighton, for £3,500, and on the signing of the contract she paid to the vendor a deposit of £350. The property was sold subject to the Sussex Law Society's Conditions of Sale, which incorporated the Law Society's Conditions of Sale, 1934 and 1949,[2] except, so far as is relevant for the purposes of this report, clause 32 (4) and (5).

On March 27, 1953, her solicitor had written to the testatrix in the following terms: "With regard to the will, do you wish to "give the house [which the testatrix was about to buy] to [the "first defendant] in addition to the £10,000 already given to her? "If so, it will be necessary to make a codicil to this effect." The testatrix replied on April 10: "I would like [the first defendant] "to have the house . . . as well as the £10,000 already arranged."

The second codicil dated April 17, 1953, provided: "Whereas "I have entered into a contract for the purchase of No. 9, Friar's

[1] See note 1 on p. 10.

[2] Law Society's Conditions of Sale, 1934 and 1949, clause 32: "(1) If a purchaser shall fail to perform his part of the contract, the vendor may give to the purchaser or to his solicitor at least ten days' notice in writing specifying the default and requiring the purchaser to make good the same before the expiration of the notice.

"(2) If the purchaser does not comply with the terms of the said notice—(*a*) the deposit money, if any, shall be forfeited to the vendor, or in the case of settled land, the Settled Land Act trustee; (*b*) the vendor may resell the property without previously tendering a conveyance to the purchaser; (*c*) the contract shall, without prejudice to the vendor's right to resume possession (if given up) and recover documents belonging to him, become void save and except that the following provisions shall apply.

"(3) Any resale may be made by auction or private contract at such time subject to such conditions and in such manner generally as the vendor may think proper."

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" Crescent, Brighton, . . . I hereby give the said property free of " all duties to my daughter . . ."

By clause 4 of the contract of sale, the purchase of the house was to have been completed on April 27, 1953, but the testatrix died on April 21. By arrangement between the parties the house was conveyed direct to the first defendant on May 21, 1953, the balance of the purchase money being paid by the executors. On July 15, probate was granted to the executors, the plaintiffs.

The executors, by originating summons, now asked the court to determine how the balance of the purchase money of the house No. 9, Friar's Crescent, Brighton, should be borne as between residue and the specific devisee of the property.

Michael Browne for the plaintiffs.
Michael Bowles for the first defendant.
E. I. Goulding for the second and third defendants.

The cases cited in argument are referred to in the judgment.

UPJOHN J. stated the facts and continued: The first question that arises is how the balance of the purchase money, which was paid to the vendor by the executors out of residue when the conveyance was executed, ought to be borne. The arrangement was made without prejudice to all questions and for convenience. Upon that three points have been argued before me. It is argued on the one side that section 35 of the Administration of Estates Act, 1925, applies to this case, and it is said that that section operates to charge the property at the date of the death of the testatrix (which, admittedly, is the relevant date), with the unpaid balance of purchase money, and it is submitted there is nothing to prevent the operation of that section. [His Lordship read section 35 (1) of the Act, and continued:] Mr. Bowles, for the first defendant, submits, for the reasons that I shall mention in a moment, that section 35 has no operation in the circumstances of this case, and that if it has, the testatrix has, in fact, by will or other document signified a contrary or other intention. He further submits that clause 32 of the Law Society's Conditions of Sale, 1934 and 1949, prevents any lien or charge arising in this case. Sub-clauses (1) (2) and (3) of clause 32 do apply to this sale (although sub-clauses (4) and (5) do not), and that gives a vendor certain rights if a purchaser fails to fulfil his part of the contract. The vendor may give a notice, and if he does give a notice and it is not complied with, then certain remedies are available to him. Those remedies are set out in sub-clause (2). It is said that that ousts the equitable lien which, at any rate, after the date fixed for completion, would arise under the operation of the general law. I am quite unable to accept that argument. The remedies provided by clause 32 are, in my judgment, additional to and not in any way in derogation of the

vendor's general rights according to law. If he chooses to avail himself of the particular remedy of clause 32, different consequences may flow; but until he does exercise that right, I can see nothing in the terms of the contract which prevents the ordinary vendor's lien for unpaid purchase money arising.

I return then to the main point. It is submitted by Mr. Bowles that, as the date of the death of the testatrix was before the date fixed for completion, the vendor had no lien upon the estate for the balance of the unpaid purchase money. A vendor's lien, he says, only arises at the date fixed for completion. He submits that the executors, in paying the balance of the purchase money shortly after the date of the testatrix's death, were not discharging a charge in any way but were performing a contract. He relies principally upon *Kettlewell* v. *Watson*,[1] in which it is important to notice that certain vendors who had allowed purchase money to remain unpaid after actual conveyance, and apparently after certain sub-conveyances, were seeking to enforce against the sub-purchasers the vendor's lien for unpaid purchase money. Lindley L.J. said this[2]: "The prima facie right of an unpaid vendor of "land to an equitable lien upon it for the amount of his unpaid "purchase money is too well established to be disputed. The "right arises whenever there is a valid contract of sale and the "time for completing that contract has arrived and the purchase "money is not duly paid." Those last words are important.

On the other side, Mr. Goulding, for the charities interested in residue, relies upon the well-known passage in *Lysaght* v. *Edwards*.[3] Sir George Jessel M.R. lays down the general law as between vendor and purchaser pending completion in these terms[4]: "It appears to me that the effect of a contract for sale "has been settled for more than two centuries; certainly it was "completely settled before the time of Lord Hardwicke, who "speaks of the settled doctrine of the court as to it. What is that "doctrine? It is that the moment you have a valid contract for "sale the vendor becomes in equity a trustee for the purchaser "of the estate sold, and the beneficial ownership passes to the "purchaser, the vendor having a right to the purchase money, a "charge or lien on the estate for the security of that purchase "money, and a right to retain possession of the estate until the "purchase money is paid, in the absence of express contract as "to the time of delivering possession. In other words, the "position of the vendor is something between what has been "called a naked or bare trustee, or a mere trustee (that is, a "person without beneficial interest), and a mortgagee who is not, "in equity (any more than a vendor), the owner of the estate, but "is, in certain events, entitled to what the unpaid vendor is, "videlicet, possession of the estate and a charge upon the estate "for his purchase money."

[1] (1884) 26 Ch.D. 501.
[2] Ibid. 507.
[3] (1876) 2 Ch.D. 499.
[4] Ibid. 506.

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Mr. Goulding submits that the vendor's charge for the purchase money arises the moment that the contract is signed. The remedies available to enforce that charge may vary according to the state of the transaction, that is to say, until the date fixed for completion, the vendor cannot actively enforce his lien by action, but he has the right (subject always, of course, to the express terms of the contract) to remain in possession and to refuse to execute a conveyance until the purchase money is paid. After the date fixed for completion, then he has a right to enforce the charge or lien by appropriate proceedings in these courts. But Mr. Goulding submits that the statement of Sir George Jessel shows that throughout, from the moment the contract was executed, the vendor has a charge for his unpaid purchase money. I think that that argument is quite correct. It seems to me that the explanation of *Kettlewell* v. *Watson* [5] is this: that the observations of Lindley L.J., which I have read, were perfectly accurate in the circumstances of that case, where unpaid vendors were seeking to enforce their remedy against sub-purchasers in respect of unpaid purchase money, and, of course, that remedy, as I have already stated, only arises after the date fixed for completion.

I am fortified in the view I have expressed by the fact that in *In re Wakefield* [6] the facts, so far as relevant to this point, were entirely indistinguishable, because the contract was signed, the date for completion was to be August 12, 1941, but the testator died on August 3. The point taken before me was, however, never taken by counsel, and was never noticed by Lord Greene M.R. or by Luxmoore L.J. I hardly think the point, had it been a valid one, could have escaped their attention. Accordingly, in my judgment, section 35 does apply unless the contrary intention is shown, because the charge for the unpaid balance of the purchase money arose upon execution of the contract.

Then the question arises whether a contrary intention for the purposes of the section is shown. It was submitted, first, that the terms of the second codicil itself showed that the testatrix intended that the balance of the purchase money was to be discharged out of residue. Secondly, reliance was placed upon the two letters passing between the testatrix and her solicitor. I do not think there is really any difference between the two. At first sight it seemed to me that the testatrix had expressed or had signified a contrary intention, because it seemed illusory to make a codicil giving the property to her daughter if, indeed, all she was giving was the property subject to payment of the unpaid purchase price, especially as she apparently considered that the gift would be substantial, for she directed that it was to be free of all duties. But having heard full argument I am unable to come to that conclusion. She gives the property which she has contracted

[5] 26 Ch.D. 501.

[6] [1943] W.N. 169; [1943] 2 All E.R. 29.

to purchase. That is undoubtedly the property referred to in the contract she had just signed, but it says nothing, either expressly or by implication, as to the incidence of section 35, and I see nothing which can exclude the operation of that section. Let me take an example. Suppose that in fact the contract had been completed in the lifetime of the testatrix, but that (solely for the sake of argument) the testatrix had borrowed on mortgage, say, £3,000 to enable her to complete the purchase, how would the codicil have operated then? I do not think it could have been argued successfully that by the terms of the codicil, or by the terms of her letters to her solicitors, she was signifying a contrary intention for the purposes of section 35. In such a case it seems to me clear that the daughter would have taken the property subject to the mortgage which the testatrix had entered into. So if the law implies a charge upon the property for unpaid purchase money, the daughter, in my judgment, takes subject to it, because the testatrix has not signified a contrary intention.

Accordingly, it seems to me that the unpaid purchase money is charged upon the property, and it having been paid out of residue without prejudice to all questions, the necessary adjustment must be made in paying the legacy of £10,000 to the daughter.

Two subsidiary questions arise. The first is as to stamp duty of £70 upon the purchase. That, in fact, has been paid out of residue, but there seems to be some dispute as to the terms upon which it was paid, and as unhappily the parties appear to be at arm's length in this case, that matter must stand over and be referred back to chambers for further evidence to be filed as to the precise terms upon which the stamp duty was discharged out of residue. I do hope that the parties will be able to compromise their differences over this somewhat trivial sum.

The last matter is with regard to the solicitors' costs incurred in completing the purchase. The scale fee seems to have been some £56, added to which there are certain search fees and petty disbursements, and so on. Of course, residue can only establish a case for throwing those costs upon the property if they can show that those costs were in some way equitably charged upon the property. No doubt had the conveyance been completed in the lifetime of the testatrix, the solicitors would have received the deeds in the normal course, and would have had an equitable lien on those deeds for any costs remaining unpaid; but what was the position at the relevant time, that is, the date of the testatrix's death? They were then doing work. No bill of costs had been rendered. Nothing at that time was due from the testatrix to her solicitors. Furthermore, they could have no lien on anything, for they had no deeds in their possession. It was somehow suggested they had some form of lien upon the contract. I do not follow that. It was their duty to carry through the contract to

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completion. I cannot see that at the relevant date this inchoate claim to costs was charged upon anything. Accordingly, those costs must be borne by residue.

Declaration accordingly.

Solicitors: *Ridsdale & Son for Somerville, Hinton & Savage, Torquay; Ranger, Burton & Frost; Wilde, Sapte & Co.*

P. P.

[COURT OF APPEAL.]

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May 5, 6, 7, 21.

Jenkins, Parker and Pearce L.JJ.

GRECH *v.* ODHAMS PRESS LTD. AND ANOTHER. ADDIS *v.* SAME.

[1956 G. No. 1840.]
[1956 A. No. 2020.]

Libel and Slander—Libel—Newspaper—Absolute privilege—Statement by witness at criminal trial—One statement false—Comment made in newspaper—Whether plea of fair comment sustainable.

The plaintiff Grech, who had been associated with a business of letting flats for immoral purposes and had been convicted on a charge connected therewith, was convicted on a charge of housebreaking and theft and sentenced to a term of imprisonment. In the same prison the plaintiff Addis, formerly a solicitor, was serving a term of imprisonment for fraud.

While serving his sentence Grech submitted two petitions to the Home Secretary to secure a review of his sentence; in them he made a number of allegations against the police in connexion with what a witness at the hearing of the action described as "vice in "the West End." He also alleged that before his trial a conspiracy had been entered into by his solicitor C., one P., and R., a police inspector (who demanded a bribe), to procure certain false evidence for the defence. In the result R., C. and P. were tried on a charge of conspiracy to defeat the ends of justice, and were convicted and sentenced on November 29, 1955. At the trial Grech stated in evidence that he had been assisted in the preparation of his petitions by a prisoner whom he did not name. P. stated in evidence that Grech had told him "that he was being helped by some solicitor "by the name of Addis or something."

On the day after the trial the defendants published the following words in the "Daily Herald": "All the dirt . . . the jury con-"victed Grech and he was sentenced to three years. There he "brooded over his belief that he had first been framed, then induced "to pay money for the 'fiddle' and yet gaoled. With the help of "Jasper Addis, an ex-solicitor, one-time man of affairs to George "Dawson—and gaoled for defrauding him—Grech drew up a peti-"tion to the Home Secretary. Into it he put all the dirt he "knew, and as a Maltese running West End flats as brothels he "thought he knew a great deal."

In actions for libel brought by the plaintiffs, the jury found that the words were defamatory; that they were untrue (as had been admitted by the defendants in Addis's case, as he had not helped Grech); that they were not a fair and accurate report of the

criminal proceedings, but that they were fair comment on a matter of public interest. Donovan J. entered judgment for the defendants. On appeal:—

Held, (1) that the words complained of could not be fair comment unless the statement on which the comment was based was either true, or else a fair and accurate report of what was said in court.

(2) That, in Grech's case, the findings of the jury could be reconciled on the supposition that the jury found, on the hypothesis that the words complained of were or might be statements of fact, they were defamatory and untrue, but that those words were comment and fair; and it could not be held that no reasonable jury could have so decided.

(3) But that, in the case of Addis, the words complained of were based on the untrue statement of fact that Addis helped Grech draw up his petition; and that that statement was not a fair and accurate report of judicial proceedings; accordingly, the defence of fair comment could not be supported in this case.

Per curiam: If a statement made by a witness is fairly and accurately reported, and attributed to the witness who made it, although the evidence given by the witness is afterwards shown to be false, the statement can be made the subject of fair comment.

Decision of Donovan J. [1958] 1 Q.B. 310; [1957] 3 W.L.R. 942; [1957] 3 All E.R. 556 affirmed in part and reversed in part.

APPEAL from Donovan J., sitting with a jury.

The plaintiff Joseph Grech had been associated with a business of letting furnished flats for immoral purposes, and in 1954 was convicted on a charge of knowingly permitting prostitution on one of the premises concerned. In July, 1954, the house of one Morrison was broken into by a thief who stole £500 and other property. In the same month Grech was arrested and charged with the theft by Detective-Inspector Robertson of the Metropolitan police (who alleged that a key of Morrison's premises had been found at Grech's flat) and was remanded on bail.

Before his trial a scheme, according to Grech, was concocted by his solicitor Canter, Robertson, and one Page, in accordance with which the lock of Grech's flat was changed for one which Morrison's key would fit, Robertson demanding and receiving a bribe. Notwithstanding this stratagem Grech was in October, 1954, convicted and sentenced to three years' imprisonment, part of which was served in Maidstone prison. In the same prison the plaintiff Jasper Addis, a former solicitor, was serving a sentence of two years' imprisonment for fraud, the person or one of the persons defrauded being a certain George Dawson. While at Maidstone Grech submitted two petitions to the Home Secretary with the object of securing a review of his sentence. In them he mentioned the affair of the key, and made a number of charges accusing certain police officers of demanding bribes in connexion with the brothel-keeping business. These petitions resulted in investigations which led to the trial at the Central Criminal Court of Robertson, Canter and Page, who were convicted on November 29, 1955, on a charge of conspiracy to defeat the

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ends of justice and sentenced to terms of imprisonment. Grech gave evidence for the prosecution and was not himself prosecuted.

The following day, November 30, 1955, the "Daily Herald" published the following words: "All the dirt. At his trial Grech "said the key was for his flat. And on the order of the court, "Robertson was sent to try it. He reported that it fitted a lock "there, but the jury convicted Grech and he was sentenced to "three years. There he brooded over his belief that he had first "been framed, then induced to pay money out for the 'fiddle' "and yet gaoled. With the help of Jasper Addis, an ex-solicitor, "one-time man of affairs to George Dawson—and gaoled for "defrauding him—Grech drew up a petition to the Home "Secretary. Into it he put all the dirt he knew, and as a Maltese "running West End flats as brothels he thought he knew a great "deal."

The plaintiffs, Grech and Addis, in a consolidated action claimed damages for libel in respect of those words against Odhams Press Ltd. and Daily Herald (1929) Ltd., the printers and publishers of the "Daily Herald." The plaintiffs alleged that by those words the defendants meant that they had made an inaccurate and dishonest report and had gratuitously disclosed to the Home Secretary scandalous allegations against other people in which they had no real belief, and that they had thereby been brought into hatred, contempt and ridicule.

By their defence the defendants admitted publication. In the case of Grech, the defendants alleged that the words formed part of a fair and accurate report of criminal proceedings and were therefore absolutely privileged; alternatively, that they were published bona fide for the information of the public and were therefore privileged; alternatively, that in as far as the words consisted of allegations of fact, they formed part of a fair and accurate report of court proceedings, and in as far as they consisted of expressions of opinion they were fair and impartial comments on a matter of public interest. In the case of Addis, the defendants relied on similar defences based on privilege. Addis had not in fact assisted Grech in the preparation of his petitions.

In the conspiracy trial Grech had stated in evidence that in preparing his petitions he had been assisted by another prisoner, whose name he did not give, in correcting his English. Page stated in evidence that Grech had told him that he had sent a petition to the Home Secretary "and was being helped in prison "by some solicitor by the name of Addis or something." One Superintendent Hannam, who had conducted the investigations, agreed in evidence at the trial of the action that the matters alleged in the petitions might compendiously be described as "vice in the West End."

At the trial of the action before Donovan J. the following questions were put to the jury and answered as follows in Grech's case: Question (1): Are the words complained of defamatory? A.: Yes. Question (2): If so, are they true? A.: No.

Question (3): If not true, are they nevertheless a fair and accurate report of some of the proceedings at the trial of Robertson, Canter and Page? A.: No. Question (4): Alternatively, are they fair comment on a question of public interest? A.: Yes. Question (5), as to damages, received no answer. In Addis's case the questions and answers were the same, except that question (2) was not put as it was admitted that Addis had no connexion with the petitions.

On those answers Donovan J., after argument, gave judgment for the defendants against both plaintiffs who appealed.

Claud Allen for the plaintiff Grech.

The plaintiff Addis in person.

F. H. Lawton Q.C. and *Hugh Davidson* for the defendants.

The following cases were cited in argument: *McQuire* v. *Western Morning News Co. Ltd.*[1]; *Merivale* v. *Carson*[2]; *Hunt* v. *Star Newspaper Co. Ltd.*[3]; *Kemsley* v. *Foot*[4]; *Mangena* v. *Wright*[5]; *Thompson* v. *Truth and Sportsman Ltd.*[6]; *Mechanical and General Inventions Co. Ltd.* v. *Austin*[7]; *Morris* v. *Victor Gollancz Ltd.*[8]; *Cooper* v. *Lawson*[9]; *Headley* v. *Barlow*[10]; *Kane* v. *Mulvaney*[11]; *Byrne* v. *Dean.*[12]

Cur. adv. vult.

May 22. JENKINS L.J., delivering the judgment of the court, stated the facts, read extracts from the summing-up dealing with questions (1), (2) and (3) relating to Grech's case, and continued: In his judgment * the judge dealt in this way with the contention raised on behalf of Grech to the effect that the finding of fair comment in answer to question (4) was inconsistent with the findings in answer to questions (1) and (2) that the words were defamatory and untrue. He said this: "It is argued that those "two findings are inconsistent. In my view they are not neces- "sarily so. Otherwise, it seems to me that the defence of fair "comment would be almost valueless; for, if the jury found that "the words were not defamatory, or being defamatory were true, "then the defence of fair comment would not be needed.† The "answers to questions (1) and (2)—more particularly question "(2)—proceed, I think, on the hypothesis that the words com- "plained of were, or might be, statements of fact; and the jury

[1] [1903] 2 Q.B. 100; 19 T.L.R. 471.
[2] (1887) 20 Q.B.D. 275.
[3] [1908] 2 K.B. 309; 24 T.L.R. 452.
[4] [1951] 2 K.B. 341; [1951] 1 T.L.R. 197; [1951] 1 All E.R. 331, C.A.; [1952] A.C. 345; [1952] 1 T.L.R. 532; [1952] 1 All E.R. 501, H.L.
[5] [1909] 2 K.B. 958; 25 T.L.R. 534.
[6] (1932) 34 N.S.W. 21 (P.C.).
[7] [1935] A.C. 346.
[8] *The Times*, April 17, 1937.
[9] (1838) 8 A. & E. 746.
[10] (1865) 4 F. & F. 224.
[11] [1866] 2 I.R.(C.L.) 402.
[12] [1937] 1 K.B. 818; 53 T.L.R. 469; [1937] 2 All E.R. 204.

* [1958] 1 Q.B. 310, 313; [1957] 3 W.L.R. 942, 944; [1957] 3 All E.R. 556, 557.
† [1957] 3 All E.R. 556, 557.

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" were saying, ' Well, on that hypothesis they were defamatory " ' and untrue.' Then in question (4), they come to consider an " alternative hypothesis—namely, that the words were fair " comment—and they come to the conclusion ' Yes, they were " ' comment and they were fair.' Therefore, since one has to " canvass every possibility in these cases and get answers from " the jury to all questions which might conceivably arise, it does " not surprise me that one receives answers such as I have " received, and which, I repeat, I do not think were inconsistent, " as is now claimed. It is said also that there is no evidence to " support the finding of fair comment. I have made fairly clear " my own view whether the words were comment at all, but it " is the jury's view which matters and I cannot say that no " reasonable person could construe the words as comment. " Suppose that the " Daily Herald " had written ' Grech drew " ' up a petition to the Home Secretary. Our comment on the " ' petition is that into it Grech put all the dirt he knew.' If " the jury read the words actually used in the present case as " really coming to the same thing as the words that I have " supposed, I could not say that it was unreasonable to do so. " Comment, I suppose, is often to be recognized and distinguished " from allegations of fact by the use of metaphor; and here, for " what it is worth, resort was had to the language of metaphor. " Again, I do not think that I can say there was no evidence of " fairness. Some of the contents of the petition were referred " to in court. It is clear from what was said in court that they " were comprehensive. I may refer, in this connexion, to two or " three questions and answers. The questions were addressed to " Superintendent Hannam, and were these: . . ." The judge then read the passage from Superintendent Hannam's evidence and continued: " It would be going too far on my part, I think, " to say that it is unfair comment, when the petitions are so " described, to say that into them somebody put all the dirt he " knew, although, as a fact, that was not true. As a comment " it might be the same thing as saying that in a defence the " pleader raised every possible point of which he could think, or " raised every defence that imagination could suggest. That " would not be strictly true, but, as a comment, one would not " say that it was unfair. I cannot say that the jury were perverse " in finding that it was fair comment." With those observations we respectfully agree.

The jury's answers must be reconciled so far as it is reasonably possible to do so, and we think they are fairly capable of reconciliation in the way indicated by the judge. The question whether the words were comment, and, if so, were they fair comment, was essentially a matter for the jury to decide, and we cannot hold that no reasonable jury could have decided it in the way this jury did. Accordingly, we would dismiss this appeal in the case of Grech.

The case of Addis appears to us to be essentially different. He

was only dragged into the matter on the strength of an allegation that Grech drew up a petition to the Home Secretary into which he put " all the dirt he knew " and so on " with the help of " Jasper Addis, an ex-solicitor, one-time man of affairs to George " Dawson, and jailed for defrauding him."

It is common ground that Addis, in fact, had nothing whatever to do with the drawing up of either petition, and it appears to us quite impossible to hold or for any reasonable jury to hold that the statement that Grech put into his petition " all the dirt " that he knew " and so on was fair comment unless the statement on which the comment was based was either true or else a fair and accurate report of what was said in court. In the result the jury did find in favour of the defendants on the question of fair comment, having been directed as follows by the judge: " This, members of the jury, is a matter for me, and you must " take this from me, and my view upon it is this, that the fact " that Addis did not assist, and, therefore, that underlying fact " was untrue, does not of itself destroy the plea of fair comment, " because it was said in open court that Addis did assist Grech— " or, at any rate, that Grech had said so—and I think that fact, " namely, that it was said in open court, prevents the inaccuracy " of this statement from being fatal of itself to the plea of fair " comment. Just as I have the privilege of saying almost any- " thing I like about anybody—sitting here—so has a witness who " goes into the witness-box and gives evidence. They have the " same privilege, and anything they say defamatory of someone " else is not actionable, if they say it in judicial proceedings. " Therefore, the fact that a witness said, inaccurately, that Grech " had told him, or implied inaccurately that Addis had assisted " Grech, does not of itself make this plea of fair comment un- " sustainable, but nevertheless the other difficulties in the " defendants' way on this plea may, in your view, be formidable " enough, anyway: Is the statement really comment at all? Is " it clear that it is comment, because it has got to be clear? If " so, is it fair comment? If you are in doubt about either of " these matters you should answer Question (3), in the case of " Addis, by saying ' No.' Only if you are satisfied that the " comment is fair comment, would you answer it ' Yes.' "

In his judgment the judge said this ‡: " In the case of Addis, " I have already ruled that the repetition of a statement made by " a witness at the trial at the Central Criminal Court did not " destroy the plea of fair comment on the ground that the state- " ment turned out to be false. It is to be noted that what was " actually said in court by the witness Page (who was one of the " defendants in the case) was that Grech had told him, Page, " that Addis had assisted in the drawing up of the petition. In " cross-examination, Grech, who was a witness, said that some- " one assisted him, but gave no name. Grech said that the only

‡ [1958] 1 Q.B. 310, 313; [1957] 3 W.L.R. 942, 944; [1957] 3 All E.R. 556.

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SAME.

" assistance given was to correct his grammar and punctuation. " The defendant's rendering of all this in the newspaper was " that Addis had helped, which no one had actually said at the " trial. This was simply the inference that the paper drew from " the evidence. No point has been raised, however, on this " interpretation of the evidence. The argument in the present " case was that, since the plaintiff Addis had not in fact helped, " the plea of fair comment could not be sustained and that the " decision in *Mangena* v. *Wright* ‡‡ on this point is inapplicable. " The reason suggested is that in that case the instances given by " Phillimore J.,§ of statements which were privileged although " inaccurate, were errors in a Parliamentary debate, or in the judg- " ment of a judge. But a witness's statements in the witness- " box are entitled, however, to the selfsame privilege: and if " comment may be fair although founded on the inaccurate state- " ment of a judge in judicial proceedings, I cannot see in principle " why comment may not also be fair although founded on an " inaccurate statement, similarly privileged, namely, that of a " witness in judicial proceedings."

It will be seen that the judge's opinion on this part of the case is based on the view that the untrue statement that " Jasper " Addis, an ex-solicitor . . ." helped Grech in drawing up his petition was a fair and accurate report of judicial proceedings in open court. The references made at the hearing to anyone helping in the drawing up of Grech's petition or petitions are these. This is the evidence of Grech: " (Q.) Did you write your first " petition, or did somebody write it for you? (A.) I wrote it. " (Q.) Did you write it with anybody's assistance? (A.) No. " (Q.) Any other person, for example? (A.) There might be some- " body who corrected my English—my mistakes. (Q.) Who " might that person be? (A.) I am afraid that, under prison " regulations and unless I am given the opportunity whether I " should answer this question or not, I shall be contravening the " regulations. (Q.) I do not want his name. Through another " prisoner? (A.) Yes, just corrected my letters, that is all. " (Q.) Just corrected your English? (A.) Yes." The other reference is when Page is giving evidence: " (Q.) Did you know " the people about whom he was complaining? (A.) Yes, Sir, " he was even telling me. (Q.) Did you know he was petitioning " the Home Secretary? (A.) Myself definitely. He kept telling " me about that, that he had sent a petition to the Home " Secretary and Scotland Yard and he was being helped in prison " by some solicitor by the name of Addis or something. That is " what he was mentioning to me."

We cannot regard these passages as justifying the claim that the categorical statement to the effect that " Jasper Addis, " an ex-solicitor . . ." helped Grech in the preparation of his

‡‡ [1909] 2 K.B. 958. § Ibid. 977.

petition was a fair or accurate report of the proceedings. There is nothing in Page's hearsay evidence beyond the statement that Grech told him that he was being helped in prison by " some " solicitor by the name of Addis or something "; and there is nothing in Grech's evidence to indicate that the unknown person who " corrected his English " was Jasper Addis.

The so-called fair and accurate report does not attribute the statement that " Jasper Addis, an ex-solicitor . . ." helped Grech to draw up the petition, to Page, but gives it as a statement of fact. In this it differs from the rest of the article which, taken as a whole, attributes the various statements to the various persons who made them. No doubt the reason for this omission is that no witness did so say. The writer jumped to the conclusion that the " Addis " referred to by Page was Jasper Addis and added the Christian name, which Page did not give, arriving as a matter of inference at the assumption that Jasper Addis was meant. He then adds true but derogatory facts about Jasper Addis. Moreover, the article contains no reference to Grech's evidence as to his unknown helper and the limited assistance which he gave. In our view, it would be impossible for a jury, properly directed, to hold that this was a fair and accurate report.

If a statement made by a witness is fairly and accurately reported, and attributed to the witness who made it, then, no doubt, although the evidence given by the witness is afterwards shown to be false, the statement reported can be made the subject of fair comment. But that is not this case.

Accordingly we hold that the defence of fair comment cannot be supported in Addis's case.

As we have already said in the case of Grech, we think the words complained of are well capable of a defamatory meaning. But in Addis's case there is not and cannot be any defence of justification inasmuch as it is admitted that Addis had nothing to do with the drawing up of either petition.

In the result, the appeal in Addis's case must be allowed.

Appeal of Grech dismissed. Appeal of Addis allowed; order for new trial limited to the question of damages.

Solicitors: *Probyn, Dighton & Parkhouse; Simmons & Simmons.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

1958
May 6, 7, 16.

Lord Goddard C.J., Cassels and Diplock JJ.

REGINA *v.* MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION). *Ex parte* HUBBLE.

National Insurance—Industrial injuries benefit—Jurisdiction of medical appeal tribunal—Appeal by claimant—Power to set aside award of medical board in claimant's favour—National Insurance (Industrial Injuries) Act, 1946 (9 & 10 *Geo.* 6, *c.* 62), *s.* 39 (2) (3).
National Insurance — Industrial injuries benefit — Fresh evidence — Power to review previous decision—Further report of surgeon on claimant's injury—Whether "fresh evidence"—National Insurance (Industrial Injuries) Act, 1946 (9 & 10 *Geo.* 6, *c.* 62), *s.* 40 (1).
Evidence—Fresh evidence.

(1) The claimant, a coal miner, sustained an injury to his back in an accident on July 14, 1955, arising out of and in the course of his employment. After a series of provisional assessments of the extent of his disablement the medical board made a final assessment of the extent of his disability at five per cent. for life from May 13, 1957. The claimant appealed against the smallness of the percentage assessment of the extent of his disablement to a medical appeal tribunal under section 39 (2) of the National Insurance (Industrial Injuries) Act, 1946.[1] There was no reference

[Reported by Norman Primost, Esq., Barrister-at-Law.]

[1] National Insurance (Industrial Injuries) Act, 1946, s. 36: "(1) Subject to the provisions of this Part of this Act, any of the following questions arising under this Act shall be determined as provided by this subsection, that is to say . . . (c) any question—(i) whether the relevant accident has resulted in a loss of faculty; (ii) whether a loss of faculty is likely to be permanent; (iii) at what degree the extent of disablement resulting from a loss of faculty is to be assessed, and what period is to be taken into account by the assessment; shall be determined by a medical board or medical appeal tribunal constituted in accordance with the following provisions of this Act. . . . (3) Except as provided by this Part of this Act or by the Family Allowances Act, 1945, as applied by paragraph (b) of subsection (1) of this section, any decision of a claim or question as provided by the foregoing provisions of this section shall be final."

S. 38: "(1) Medical boards for the purposes of this Act shall be appointed by the Minister and shall consist of two or more medical practitioners of whom one shall be appointed as chairman: Provided that the Minister may arrange with any other Government department that any medical board consisting of two or more medical practitioners appointed or recognized by that department shall be a medical board for the purposes of this Act. (2) Medical appeal tribunals for the purposes of this Act shall be appointed by the Minister and shall consist of a chairman and two medical practitioners. (3) Subject as aforesaid the constitution of medical boards and medical appeal tribunals shall be determined by regulations."

S. 39: "(1) The case of any claimant for disablement benefit shall be referred by the insurance officer to a medical board for determination of the disablement questions in accordance with the following provisions of this Part of this Act relating to the determination of claims, and if, on that or any subsequent reference, the extent of the disablement is provisionally assessed, shall again be so referred not later than the end of the period taken into account by the provisional assessment. (2) If the claimant is dissatisfied with the decision of a medical board, he may appeal in the

to the tribunal by the insurance officer on behalf of the Minister under section 39 (3) of the Act of 1946, and the only contention before the tribunal was that the award was too small. By their decision of July 15, 1957, the tribunal set aside the award of the medical board finding that any loss of faculty that may have been received was due to an aggravation of a pre-existing condition and that the aggravation had ceased by May 12, 1957.

A report by a surgeon dated June 28, 1957, had been tendered to the tribunal on the claimant's behalf stating that it was too early to estimate the final assessment of the disability.

(2) Subsequently, on August 2, 1957, the claimant had a further examination by the surgeon, who in his report stated that an operation which the claimant had undergone on July 5, 1957, disclosed the presence of a disc injury, that the disability was the result of an injury, and that the permanent disability would be more than 5 per cent. On the basis of this report the claimant asked for a review of his case under section 40 (1) of the Act of 1946. The reviewing medical board made a provisional assessment of 10 per cent. from May 13, 1957, until June 16, 1957, and of 100 per cent. from July 17, 1957, until October 17, 1957. The decision of the reviewing medical board was referred by the Minister to the medical appeal tribunal under section 39 (3) of the

" prescribed manner and within the " prescribed time and the case shall " be referred to the medical appeal " tribunal: Provided that an appeal " shall not lie against a provisional " assessment of the extent of disable- " ment before the expiration of two " years from the date of the first " reference of the case to a medical " board under the foregoing sub- " section, nor where the period taken " into account by the assessment falls " wholly within the said two years. " (3) If the Minister notifies the in- " surance officer within the prescribed " time that he is of opinion that any " decision of a medical board ought " to be considered by a medical appeal " tribunal, the insurance officer shall " refer the case to a medical appeal " tribunal for their consideration, and " the tribunal may confirm, reverse, " or vary the decision in whole or in " part as on an appeal."

S. 40: " (1) Any decision under this " Act of a medical board or a medical " appeal tribunal may be reviewed at " any time by a medical board if " satisfied by fresh evidence that the " decision was given in consequence " of the non-disclosure or misrep- " resentation by the claimant or any " other person of a material fact " (whether the non-disclosure or mis- " representation was or was not " fraudulent). (2) Any assessment of " the extent of the disablement result- " ing from the relevant loss of faculty " may also be reviewed by a medical " board, if satisfied that since the " making of the assessment there has " been a substantial and unforeseen " aggravation of the results of the " relevant injury: Provided that an " assessment shall not be revised " under this subsection unless the " medical board are of opinion that, " having regard to the period taken " into account by the assessment " and the probable duration of the " aggravation aforesaid, substantial " injustice will be done by not revising " it."

S. 50: " (1) Any decision under " this Act of an insurance officer, a " local appeal tribunal or the Com- " missioner may be reviewed at any " time by an insurance officer, or, " on a reference from an insurance " officer, by a local appeal tribunal, " if—(*a*) he or they is or are satisfied " by fresh evidence that the decision " was given in ignorance of, or was " based on a mistake as to, some " material fact; . . ."

National Insurance (Industrial Injuries) Act, 1953, s. 4: " (3) Where, " in connection with a claim for dis- " ablement benefit, it is decided that " the relevant accident has not " resulted in a loss of faculty the " decision — (*a*) may be reviewed " under subsection (2) of section 40 " of the principal Act as if it were " an assessment of the extent of dis- " ablement resulting from a relevant " loss of faculty; but (*b*) subject to " any further decision on appeal or " review, shall be treated as deciding " the question whether the relevant " accident has so resulted both for the " time about which the decision was " given and for any subsequent time. " . . ."

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Act of 1946. By their decision of October 28, 1957, the tribunal set aside the reviewing medical board's assessments, finding that the further report of the surgeon was not fresh evidence within section 40 (1) of the Act of 1946.

On applications by the claimant to quash both decisions of the medical appeal tribunal:—

Held, (1) that the medical appeal tribunal had jurisdiction to set aside the award of the medical board, even though there was no contention that the loss of faculty was not caused by the accident; when a case came before it, whether on an appeal by a claimant or on a reference by the Minister, its function was to determine the whole case de novo.

(2) That the further report of the surgeon of August 2, 1957, did not constitute fresh evidence and therefore there was no power to review the decision under section 40 (1) of the Act of 1946; "fresh evidence" was evidence which could not with reasonable diligence have been made available at the hearing, and bore a meaning similar to that which it had under the Summary Jurisdiction (Married Women) Act, 1895.

Johnson v. *Johnson* [1900] P. 19; 16 T.L.R. 26 followed.

APPLICATIONS for orders for certiorari to remove into the court two decisions dated respectively July 15 and October 28, 1957, of the Medical Appeal Tribunal (North Midland Region), made pursuant to the National Insurance (Industrial Injuries) Act, 1946.

The following facts are taken from the judgment.

First decision.—On July 14, 1955, the applicant, Horace Hubble, a coal miner, employed at Hucknall Colliery, Notts, sustained an injury to his back by accident arising out of and in the course of his employment. The injury was diagnosed as a prolapsed intervertebral disc, and he drew injury benefit for the various periods for which he was absent from work until the injury benefit period expired on January 12, 1956. Thereafter, the appropriate medical board at Mansfield made a number of successive provisional assessments of the extent of his disablement for relatively short periods, ultimately expiring on May 12, 1957, and on April 24, 1957, the medical board made a final assessment of the extent of his disability at 5 per cent. from May 13, 1957, for the period of his life, and found that the loss of faculty in respect of which the assessment was made resulted from the accident of July 14, 1955. The effect of the finding was to entitle the applicant to a disablement gratuity under section 12 (6) of the National Insurance (Industrial Injuries) Act, 1946, of an amount which worked out at £67 10s.

On April 30, 1957, the applicant was again off work owing to his back condition and remained off work until on June 17, 1957, he was admitted to Harlow Wood Hospital where, on July 4, 1957, he underwent an operation for removal of a prolapsed disc.

On June 5, 1957, while awaiting admission to hospital, he appealed under section 39 (2) to the medical appeal tribunal against the medical board's decision of April 24, 1957, assessing the extent of his disablement at 5 per cent. The relevant regulations did not require a notice of appeal to be a formal document,

but it had to contain a statement of the grounds on which the appeal is made. The applicant's notice of appeal was in the following terms: "Dear Sirs, I wish to appeal against the final "assessment of 5 per cent. awarded to me on 24.4.57. I have "only worked 4 days since 24.4.57 and am now awaiting admis- "sion to Harlow Wood Hospital. Yours faithfully, H. Hubble." This was an appeal against the smallness of the percentage assessment of the extent of his disablement on the grounds that on the medical facts 5 per cent. was too little.

Although the regulations did not provide for the Minister's submitting any written statement to the medical appeal tribunal, there were in fact submitted some written observations by the Minister concluding with a submission that "having regard to the "medical evidence (a) the [applicant's] back condition is only "partly attributable to the relevant accident, and (b) the relevant "loss of faculty has been correctly assessed."

The applicant's case was heard by the medical appeal tribunal on July 15, 1957. By that date the claimant had already undergone the operation of July 4, 1957, and was still in hospital. He was represented before the tribunal by a trades union official, who tendered a report by Mr. Malkin, a surgeon who had examined the claimant in hospital on June 28, 1957, before the operation, and expressed the view that it was too early to give an estimate of what the final assessment of the extent of his disablement should be. It appears from Mr. Malkin's report that the claimant had in fact suffered from pain in his back as early as December, 1954, some seven months before the relevant accident of July 14, 1955.

At the hearing before the tribunal, the respective contentions of the applicant and the Minister were advanced. On July 24, 1957, the tribunal notified the claimant of their decision in the following terms: "Dear Sir, With reference to your claim for dis- "ablement benefit the medical appeal tribunal, which considered "your case on 15.7.57, decided that (1) from May 13, 1957, there "is no loss of faculty resulting from industrial accident on July 14, "1955. The findings of the tribunal are summarized as follows: "Mr. Hubble is in hospital but we heard Mr. Clarke of the National "Union of Mineworkers with the medical report of June 28, "1957, by Mr. Malkin. It is clear from the medical evidence "before us, including the hospital notes, that any loss of faculty "which may have resulted from the relevant accident was only "an aggravation of a pre-existing condition, which aggravation "had ceased by May 12, 1957. We set aside the assessment of "medical board of April 24, 1957."

Second decision.—After the tribunal's decision of July 15, 1957, which was notified to the applicant on July 31, 1957, the applicant remained in hospital and was, on August 2, 1957, examined again by his surgeon, Mr. Malkin, who reported that the operation has disclosed that a disc injury was present. He expressed his opinion that the applicant's disability was the result

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of an injury, and that his permanent disability would be more than 5 per cent. This report did not differ substantially from his previous report of June 28, 1957, except that he had now obtained positive confirmation of his previous suspicions that a disc injury was present, and he was now prepared to say that the permanent disability would be more than 5 per cent. Armed with this report, the applicant on August 4, 1957, asked for a review under section 40 (1) of the Act by the medical board of the tribunal's decision of July 15, 1957, on the grounds that fresh evidence showed that the tribunal's decision was given in consequence of non-disclosure or misrepresentation. On August 28, 1957, the medical board decided that there was such fresh evidence, the nature of which they stated in the following terms: "The claimant, Mr. Hubble, "was admitted to Harlow Wood on June 17, 1957, operation "July 5, 1957, for prolapsed intervertebral disc. Some graft "from left ilium followed by plaster of Paris and now confined "in strict bed and still a patient at Harlow Wood. Also a further "report confirming the above from Mr. Malkin's letter August 2, "1957." They made provisional assessments of the extent of the disablement from May 13 to June 17, 1957, of 10 per cent. and from June 17 to October 17, 1957, of 100 per cent.

The Minister then directed the insurance officer to refer the case to the medical appeal tribunal under section 39 (3) of the Act. It was heard by the tribunal on October 28, 1957, who decided that there was no "fresh evidence" to show that their decision of July 15 was given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a material fact. They therefore set aside the decision of the medical board of August 28, 1957.

In their reasons for their decision, they purported to follow a decision of the Industrial Injuries Commissioner under section 50 of the Act that "fresh evidence means some evidence which the "claimant was unable to produce before the decision under review "was given or which he could not reasonably be expected to have "produced in the circumstances of the case." As the operation took place on July 4, 1957, eleven days before the hearing of the original appeal, the tribunal took the view that there was sufficient time for the claimant to have obtained a further report from Mr. Malkin on the results of the operation, and the conclusions to be drawn from it before the applicant's case was heard by them on July 15, 1957.

The applicant contended that the decision of the tribunal notified on July 31, 1957, setting aside the assessment of the medical board without having before it an application by the Minister under section 39 (3) of the Act of 1946 was made without jurisdiction; it was further contended that the decision of the tribunal notified on November 1, 1957, setting aside the decision of the reviewing medical board was wrong in law, apparent on the face of the decision, in holding that fresh evidence meant evidence which the applicant was unable to produce before the

decision notified on July 31, 1957, or which he could not reasonably have been expected to produce in the circumstances of the case.

The applicant therefore moved to bring up and quash both decisions.

F. W. Beney Q.C. and *H. S. Ruttle* for the applicant.

Rodger Winn for the Minister of Pensions and National Insurance.

The following cases were cited in argument, in addition to those referred to in the judgment: *Corbett* v. *Corbett* [2]; *Ellerby* v. *March* [3]; *Reg.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Hierowski* [4]; *Gordon-Cumming* v. *Houldsworth* [5]; *Quigley* v. *Mathieson Gee (Ayrshire) Ltd.* [6]; *Newman* v. *Newman* [7]; *Bowen* v. *Bowen.* [8]

Cur. adv. vult.

LORD GODDARD C.J. Diplock J. will give the judgment of the court.

DIPLOCK J. These are applications for orders of certiorari to remove into this court two decisions dated respectively July 15 and October 28, 1957, of the Medical Appeal Tribunal (North Midland Region), made pursuant to the National Insurance (Industrial Injuries) Act, 1946.

As its long title states, that Act substituted for the Workmen's Compensation Acts, 1925–1945, a system of insurance against personal injuries caused by accident arising out of or in the course of a person's employment. Part I of the Act makes provision for the funds required for paying benefits under the Act to be raised from contributions by employers and insured persons and from moneys provided by Parliament. Part II provides for the various classes of benefit to be paid to insured persons who suffer personal injury caused by accident arising out of and in the course of their employment. Such a person is entitled in the first instance to daily "injury benefit" while he is incapable of doing work, up to a maximum period of some six months from the date of the accident. Thereafter he is entitled to "disablement benefit" if he suffers as a result of the injury from loss of physical or mental faculty. It is with the applicant's right to disablement benefit that the present cases are concerned. The amount of disablement benefit to which an insured person is entitled depends upon the extent of his disablement which is

[2] [1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69.

[3] [1954] 2 Q.B. 357; [1954] 3 W.L.R. 53; [1954] 2 All E.R. 375.

[4] [1953] 2 Q.B. 147; [1953] 2 W.L.R. 1028; [1953] 2 All E.R. 4.

[5] [1910] A.C. 537.

[6] [1952] W.N. 193; 1952 S.C. (H.L.) 38; 1952 S.L.T. 239.

[7] [1958] 1 W.L.R. 35; [1957] 3 All E.R. 698.

[8] [1958] 1 W.L.R. 508; [1958] 1 All E.R. 777.

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required to be assessed in accordance with the principles laid down in section 12 of the Act.

It is sufficient for the purpose of the present cases to draw attention to the facts, first, that the disablement is not to be treated as resulting from the injury if the loss of physical or mental faculty from which the insured person suffers is one to which he would in any case have been subject as a result of a congenital defect or of an injury or disease received or contracted before the relevant accident; secondly, that the extent of disablement is to be assessed on a percentage basis adopting as a standard certain prescribed loss of faculty which is to be taken as amounting to 100 per cent. disablement; and, thirdly, that the extent of disablement is in no way dependent upon loss of earning power or additional expense. Other provisions of the Act provide for increase of benefit in respect of these matters. And, finally, the assessment may be either final (that is, taking into account the whole of the period for which the loss of faculty may be expected to continue), or provisional (that is, taking into account some shorter period), according to whether or not the possibility of changes in the insured person's condition allow of a final assessment being made.

It is to be observed that all the issues which arise upon the determination of the existence, and the assessment of the extent, of the disablement depend upon matters of medical fact and opinion. It is not, therefore, surprising when one turns to Part III of the Act, which deals with the determination of questions and claims, to find it provided by section 36 (1) (*c*) of the Act that "any question (i) whether the relevant accident has resulted "in a loss of faculty; (ii) whether a loss of faculty is likely to "be permanent; (iii) at what degree the extent of disablement "resulting from a loss of faculty is to be assessed and what "period is to be taken into account by the assessment; shall be "determined by a medical board or medical appeal tribunal con-"stituted in accordance with the following provisions of this "Act." By subsection (3) any decision of any of such questions (referred to thereafter in the Act as "disablement questions") by a medical board or medical appeal tribunal is to be final, except as provided by Part III of the Act.

By section 38 medical boards are to consist of two or more medical practitioners, and medical appeal tribunals are to consist of a chairman (who in practice is generally a Queen's Counsel) and two medical practitioners. All claims for benefit, including claims for disablement benefit, are by section 48 of the Act to be submitted by the claimant in the first instance to an insurance officer. Any claim for disablement benefit necessarily involves one or more "disablement questions."

First Case.—Section 39, upon the true construction of which the first of the cases now under consideration turns, lays down the procedure to be adopted once a claim for disablement benefit has been submitted to the insurance officer.

[His Lordship read section 39, stated the facts relevant to the first case and continued:] Although the regulations do not provide for the Minister's submitting any written statement to the medical appeal tribunal, there were in fact submitted, in accordance with what is apparently the usual practice, some written observations by the Minister on the medical aspects of the case concluding with a submission that "having regard to the medical evidence (a) the "claimant's back condition is only partly attributable to the "relevant accident, and (b) the relevant loss of faculty has been "correctly assessed."

It is thus clear that neither the claimant nor the Minister was contending that the claimant's injury was not attributable at least in part to the accident, nor was the Minister contending that the 5 per cent. assessment was too high. The claimant was contending it was too small. This was the only difference between them. Further, the claimant's case was referred to the medical appeal tribunal solely as a result of the claimant appealing from the decision of the medical board, under section 39 (2). It was never referred to the tribunal by the insurance officer upon the direction of the Minister under subsection (3).

It is seen from the tribunal's decision that so far from allowing the appeal they set aside even the assessment of 5 per cent. disability, a finding for which neither the claimant nor the Minister, through the insurance officer, had contended.

Mr. Beney, on behalf of the claimant, submits that in so doing the tribunal acted without jurisdiction. Their jurisdiction, he says, upon a reference under section 39 (2), is limited to either acceding in whole or in part to the contentions of the appellant claimant and allowing the appeal, or dismissing the appeal with the consequence that the decision of the medical board appealed from stands. The tribunal have no jurisdiction to reduce or set aside the medical board's assessment unless the Minister has, in effect, cross-appealed by himself directing the insurance officer to refer the case to the tribunal under subsection (3). Alternatively, Mr. Beney says that the tribunal have no jurisdiction to reduce or set aside the medical board's assessment where, as in this case, upon an appeal by the claimant, the Minister or insurance officer does not put forward to the tribunal any contention that the assessment should be reduced or set aside. In other words, he seeks to apply to the reference of a case to a medical appeal tribunal upon an appeal by a claimant under section 39 (2) of the Act the rules and practice adopted by the Court of Appeal in ordinary civil litigation.

We think that this submission is based upon a misapprehension of the purpose of the Act and the functions of medical boards and medical appeal tribunals. A claim by an insured person to benefit under the Act is not truly analogous to a lis inter partes. A claim to benefit is a claim to receive money out of the insurance funds fed by contributions from all employers, insured persons and the Exchequer. Any such claim requires investigation to

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determine whether any and if so what amount of benefit is payable out of the fund. In such an investigation the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action. Where the claim is for disablement benefit, a necessary step in the investigation is the determination of one or more questions of medical fact and opinion, and accordingly, where such a claim is made section 39 (1) makes it mandatory upon the insurance officer to refer " the case " of the claimant to a medical board for the determination, not of the claim, but of the disablement questions which require to be investigated. As an expert investigating body it is the right and duty of the medical board to use their own expertise in deciding the medical questions referred to them. They may, if they think fit, make their own examination of the claimant and consider any other facts and material to enable them to reach their expert conclusion as doctors do in diagnosis and prognosis of the case of an ordinary patient. Just as it is " the " case " of the claimant which is to be referred to the medical board by subsection (1) of section 39, so also it is " the case " of the claimant which is to be referred to the medical appeal tribunal under subsections (2) and (3).

The effect of these subsections is, in our view, to substitute in the cases to which they apply another and presumably more highly qualified expert investigating body for the medical board, and we see no grounds for holding that their function is any different from that of the medical board, namely, to use their own expertise to reach their own expert conclusions upon the matters of medical fact and opinion involved in " the case " of the claimant.

Mr. Beney does not indeed contend that, if the case is referred to the medical appeal tribunal by the insurance officer under subsection (3), the tribunal has not an unrestricted right and duty to reach its own conclusions de novo whatever may have been the decision of the medical board. The words " the tribunal may " confirm, reverse or vary the decision in whole or in part " are too compelling. (Compare *Stepney Borough Council* v. *Joffe*.[1]) That those words in subsection (3) are followed by the words " as " on an appeal " point strongly to the conclusion that the tribunal have a similar power when " the case " is transferred to the tribunal consequent upon an appeal by a dissatisfied claimant under subsection (2). It would, we think, indeed be a strange conclusion if the medical appeal tribunal, an expert investigating body, was bound to substitute its opinion on technical medical matters for that of the medical board when its opinion was more favourable to the claimant and was not entitled to do so when its opinion was less favourable. So to circumscribe the powers of the medical appeal tribunal would be to take away from them the

[1] [1949] 1 K.B. 599; 65 T.L.R. 176; [1949] 1 All E.R. 256.

function of determining "disablement questions" expressly conferred upon them by subsection (3) of section 36 of the Act. As there is no lis inter partes in such a determination we see no grounds for limiting the unfettered powers conferred upon them by the terms of the Act to determine disablement questions when the case is referred to them under section 39 (2) by applying rules of practice adopted by appellate courts in ordinary litigation between adverse parties to an inquiry or investigation to which such litigation bears no true analogy.

The application for certiorari in respect of the decision of July 15, 1957, is, accordingly, dismissed.

Second Case: Section 40 (1) of the Act, upon the true construction of which the second case largely turns, is in the following terms: [His Lordship read the section, stated the facts relevant to the second case and continued:]

For a decision to be reviewed under section 40 (1) of the Act two conditions must be fulfilled: first, the board or the tribunal must be satisfied that the decision to be reviewed was given in consequence of the non-disclosure or misrepresentation of the claimant or any other person of a material fact (whether the non-disclosure or misrepresentation was or was not fraudulent), and secondly, the board or tribunal must be so satisfied by fresh evidence.

As regards the first condition, Mr. Beney submits that it is fulfilled if there is any omission by the claimant or any other person to put before the board or tribunal any material fact, whether known to the claimant or such other person at the time of the hearing of the decision under review or not. As regards the second condition, he contends that "fresh evidence" simply means further evidence whether it was, or could with reasonable diligence have been, available at the time of the original hearing or not.

If Mr. Beney were right, it would mean that any claimant—or presumably any insurance officer—if dissatisfied by a decision of a medical appeal tribunal, could go and get an opinion from another doctor, and relying upon this or anything contained in it as a material fact, apply for a review. If unsuccessful, the process could be repeated any number of times by obtaining fresh opinions from fresh medical men.

We think that both submissions are wrong. "Non-"disclosure" in the context of the subsection, where it is coupled with misrepresentation, means a failure to disclose a fact known to the person who does not disclose it. The term "non-"disclosure" is a familiar term in insurance law. It may be innocent if the person failing to disclose the fact does not appreciate its materiality: fraudulent if he does. But there can be no non-disclosure of a fact which is not known. That the draftsman of the Act appreciated the distinction between non-disclosure of facts and ignorance of them is evident from the

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provisions of section 50 (1) (*a*) of the Act, which provides for a review of decisions (on matters other than medical matters) of an insurance officer, a local appeal tribunal or the commissioner if "he or they are satisfied by fresh evidence that the decision was "given in ignorance of, or was based on a mistake as to, some "material fact."

It does not appear from the material before us whether there were any material facts relating to the operation of July 4, 1957, or the claimant's condition thereafter which were known to the claimant or the union official, who represented him at the time of the hearing of July 15, 1957, and were not disclosed to the tribunal then. As the tribunal based their decision of October 28, 1957, on their view of the meaning of "fresh evidence," there is no express finding as to this. If, therefore, we were of opinion that they were wrong as to the meaning of "fresh evidence," further facts might be necessary to enable us to come to a conclusion.

The statute requires the board or tribunal to be satisfied not by "further evidence"—a familiar and it may be a non-committal term—but by "fresh evidence," an expression used in analogous circumstances in the Summary Jurisdiction (Married Women) Act, 1895, which has been the subject of well-established and consistent judicial interpretation. We cannot do better than adopt the words of Sir Henry Jeune P. in *Johnson* v. *Johnson*[2]: "It means practically the same sort of evidence as "that upon which a new trial would in the ordinary course be "granted; it must relate to something which has happened since "the former hearing or trial, or it must be evidence which has "come to the knowledge of the party applying since that hearing "or trial, and which could not by reasonable means have come to "his knowledge before that time. It must amount to what was "called in the old forms of pleading res noviter ad notitiam "preventa. It is altogether a mistake to suppose that 'fresh "'evidence' within the meaning of the Act of 1895 means or "includes evidence which could have been called but which was "not in fact adduced at the first hearing. It would be monstrous "to suppose that a party could abstain from calling evidence "and could thereafter proceed to make application upon applica-"tion based on evidence which might have been tendered in the "first instance."

In the context of the present subsection it would be even more monstrous to suppose that a party could fail to disclose or misrepresent (even fraudulently) a material fact known to him and could thereafter proceed to make application upon application for a review based upon successive corrections of non-disclosures or misrepresentations of which he was guilty in the first instance.

It is not contended by Mr. Beney that, even if the material before us had shown a "non-disclosure" (in the sense we have

[2] [1900] P. 19, 21; 16 T.L.R. 26.

given to that expression) of a material fact at the hearing by the tribunal on July 15, there was any "fresh evidence" in the above sense before the medical board on August 28 or before the medical appeal tribunal on October 28, 1957. The decision of the tribunal of October 28, 1957, was therefore so far as appears upon its face correct in law, although there may have been an additional reason for arriving at the same conclusion owing to the absence of any evidence, either fresh or otherwise, of any "non-" disclosure or misrepresentation by the claimant or any other "person" at the original hearing on July 15, 1957.

The application for certiorari in respect of the decision of October 28, 1957, is therefore dismissed.

The conclusions we have reached in these two cases illustrate what we think is a consistent scheme in the Act as regards the determination of "disablement questions." These are purely matters of medical fact and opinion to be decided by expert investigating bodies, either the medical board or, if the claimant or the Minister is not content with the decision of the medical board, by the medical appeal tribunal which substitutes its expert opinion for that of the medical board. Prima facie, the decision of the medical appeal tribunal is final; but it may be reopened in three circumstances: first, under section 40 (1) if the decision has been induced by non-disclosure or misrepresentation of a medical fact by any person, not necessarily the claimant, being a material fact which was not known and could not by reasonable means have been known at the time of the original hearing to the person seeking to reopen the matter. It follows, therefore, that a person guilty of non-disclosure or misrepresentation can never seek to reopen the matter on these grounds.

Secondly, it may be reopened under section 40 (2) as amended by the National Insurance (Industrial Injuries) Act, 1953, if since the date of the decision there has been an unforeseen aggravation of the results of the relevant injury.

Thirdly, under section 4 (3) of the Act of 1953 there can be reopened in like manner and in similar circumstances a decision, such as that in the first of the present cases, that the relevant accident has not resulted in a loss of faculty. It was not, however, upon this ground that the appellant applied for a review. Nothing in our decision today affects his right to do so if he should be so advised; but that depends upon matters of medical fact and opinion which are outside our competence.

Applications dismissed.

Solicitors: *Taylor, Jelf & Co., agents for Hopkin & Sons, Nottingham; Solicitor, Ministry of Pensions and National Insurance.*

[QUEEN'S BENCH DIVISION.]

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May 20.

Devlin J.

COMPANIA CRYSTAL DE VAPORES OF PANAMA *v.* HERMAN & MOHATTA (INDIA) LTD.

Shipping — Charterparty — Demurrage — "Weather working days" — Tides—Ship's safety threatened by bore tides—Harbour master ordering ship out of berth for six days—Whether time lost "weather "working days"—Whether failure to load excused by harbour master's order—Illegality.

Contract—Illegality—Place of performance, by law of—Law or executive order—Temporary prevention—Loading of ship postponed.

Ships' Names—Maria G.

By a clause in a charterparty it was provided: "Cargo to be "loaded and stowed free of expense to the ship at the average rate "of 400 tons per weather working day." The vessel in question, after its arrival in Calcutta, the port of loading, was ordered by the harbour master to move from its berth, because he thought that it could become a danger during the bore tides if it remained there. The vessel did not return to the berth until six days later, during which time loading was discontinued. On the question whether the time thus lost in loading was to be included in the assessment of lay time:—

Held, (1) that, assuming the bore tides were "weather" within the charterparty, such threat of bad weather to the safety of the ship, which did not affect the actual operation of loading, was not sufficient to exclude a day from being a weather working day.

(2) That, assuming the shipowner in removing the vessel was acting voluntarily, the act of removal was caused by something beyond the shipowner's control and for which he was not to blame, and did not accordingly interrupt the running of the lay time.

Houlder v. *Weir* [1905] 2 K.B. 267; 21 T.L.R. 503 applied.

(3) That, while non-compliance with the harbour master's order would have been a breach of the local law, illegality was no excuse for the failure to load unless it prevented the act of loading; it was not enough to point to a law, which prevented loading during a particular part of the lay time, and, therefore, the time lost was to be included in the assessment of lay time.

S.S. "Induna" v. *British Phosphate Commissioners* [1949] 2 K.B. 430; 65 T.L.R. 149; [1949] 1 All E.R. 522 applied.

Cantiere Navale Triestina v. *Russian Soviet Naphtha Export Agency* [1925] 2 K.B. 172; 41 T.L.R. 355 distinguished.

SPECIAL CASE stated by an umpire.

By a charterparty made between A. Lusi Ltd. of London, as agents for and on behalf of Compania Crystal De Vapores of Panama, the owners of the steamship *Maria G*, and Herman & Mohatta (India) Ltd. of Calcutta, the charterers, it was agreed that "the said vessel shall proceed to Calcutta or so near thereto "as she may safely get and lie always afloat, and there load a full "and complete cargo of skullscrap and/or allied scrap not exceed-"ing 50 cubic feet bale per ton deadweight." By clause 5 of the charterparty, it was provided that "cargo was to be loaded and

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

" stowed free of expense to the ship at the average rate of 400 " (four hundred) tons per weather working day, Sundays and " holidays excepted, even if used."

Disputes having arisen under the charterparty, they were referred to arbitrators, who, being unable to agree, appointed an umpire. The umpire made his award in the form of a special case. He found the following facts:

The *Maria G* was a vessel of 335 feet 6 ins. in length with a beam of 46 feet 2 ins., 3,594 tons gross, 2360 tons net, registered at the port of Panama. The vessel on arrival at Calcutta on April 26, 1954, was ordered by the charterers to berth at the No. 1 Garden Reach Jetty, which berth was 600 feet in length. There was no evidence sufficient to justify a finding that the said berth was an unsafe berth. It was a normal berth and no objections were raised to the berth by the master of the *Maria G* at any time. Notice of readiness was tendered and accepted by the charterers on April 27, 1954, at 10.45 a.m. Loading commenced during the evening, and lay time commenced at 1 p.m. on April 29. The vessel loaded cargo day and night from April 28, until noon on April 30, when she shifted from No. 1 Garden Reach Jetty to King George Docks Buoys, where mooring was completed at 5 p.m. The vessel returned to No. 1 Garden Reach Jetty on May 6, in which berth she was secured at 10 a.m. whereupon loading was resumed. The vessel moved about 60 feet along Garden Reach Jetty to enable shore cranes to work Nos. 1 and 2 hatches; loading was completed on May 19. The vessel had been ordered by the harbour master to shift away from her berth at No. 1 Garden Reach Jetty to the King George Dock Buoys on April 30, because the harbour master was of the opinion that the vessel by reason of her overall length in relation to the jetty and the mooring facilities available at the jetty could become a danger during the bore tides, which were expected and in fact materialized between May 1, and May 5, 1954. The drafts of the vessel at the time of shifting on April 30, were: Forward 7 feet 4 ins., Aft 16 feet 5 ins., and mean 11 feet 10½ ins. The master of the vessel had not expected to be ordered out of the berth. Without knowledge of the mooring facilities at the Garden Reach Jetty, the reasons for the harbour master's actions were not apparent; but the harbour master was in the best position to judge and he was acting reasonably and, inter alia, for the safety of the vessel in ordering her away from the Garden Reach Jetty during the bore tides; further the vessel was in a safe position at the buoys in the King George Dock. The master of the *Maria G* was obliged to conform to the orders of the harbour master.

The question of law for the decision of the court was whether the time lost in loading between noon on April 30, to 10 a.m. on May 6, was to be included in the assessment of lay time at the loading port.

On the assumption that the total of such time could properly be included in the statement of lay time, the amount of demurrage

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was £872 1s. 8d. If such time was to be excluded in calculating lay time at the loading port, it was agreed between the parties that there was due to the charterers the sum of £76 6s. in respect of dispatch. The charterers had in fact paid to the shipowners the sum of £867 1s. 9d. on June 2, 1954, in respect of demurrage.

Subject to the court deciding the question of law in the affirmative, the umpire found that the charterers were not entitled to claim a refund of the demurrage already paid by them and awarded the shipowners the sum of £5, the balance of demurrage.

If the court should answer the question of law in the negative he awarded the charterers the sum of £867 1s. 8d., being the amount of demurrage paid by them, and the sum of £76 6s., being the dispatch due to the charterers.

The umpire also made awards in respect of other items of dispute which are not the subject of this report.

R. A. MacCrindle for the shipowners.
Basil Eckersley for the charterers.

The following authorities were referred to in argument, in addition to those cited in the judgment: *Alexander & Sons* v. *Hansa*[1]; *Alvion S.S. Corporation Panama* v. *Galban Lobo Trading Co. S.A. of Havana*[2]; *Bennetts & Co.* v. *Brown*[3]; *Dampskibsselskabet Botnia* v. *Bell*[4]; Carver's Carriage of Goods by Sea (10th ed.), p. 838.

DEVLIN J. stated the facts and continued: The question of law which is stated in the case for my decision is "whether the "time lost in loading between noon on April 30, 1954, to 10 "o'clock on May 6, 1954, is to be included in the assessment of "lay time." The lay days were still running when the vessel was moved. It is expressly found that she was not on demurrage on April 30, when she moved to the King George Dock Buoys.

I think that, logically, the first question that arises (although it does not appear to have been a point that was expressly taken before the umpire) is on the point that has been argued by Mr. Eckersley as to whether these six days were or were not weather working days. He submits that they were not weather working days and, if that be right, then they ought not to be counted as lay time within the meaning of clause 5. Two questions seem to me to arise. First, is a bore tide, that is, something in the nature of a tidal wave, "weather," so that if the work on a particular day is prevented by a bore tide it ceases to be a weather working day? Secondly, if the position is, as it is here, not that the bore tide actually prevented the loading of the ship or, indeed, that it would have prevented the loading of the ship if she remained

[1] [1920] A.C. 88; 35 T.L.R. 709.
[2] [1955] 1 Q.B. 430; [1955] 2 W.L.R. 543; [1955] 1 All E.R. 457.
[3] [1908] 1 K.B. 490; 24 T.L.R. 199.
[4] [1932] 2 K.B. 569; 48 T.L.R. 93.

in the berth—there is no finding as to that fact—but that the threat of the bore tide upon the safety of the ship was such as to make it reasonable for her to leave the berth, are the days when she is absent from the berth weather working days?

I have had cases cited to me on both sides as to the meaning of " weather " for this purpose, whether surf is " weather " and whether ice is " weather "; but I find it simpler to decide this point upon the second of the questions which I have set out and I shall assume, without deciding it, that a bore tide is " weather " within the meaning of this clause. But no case has been cited to me in which a mere threat of bad weather has been held to make a day not a weather working day and certainly no case where the threat of bad weather has affected not the operation of the actual work of loading, but the safety of the ship in the particular place in which she was. In my judgment, the expression " weather working days " cannot be construed so widely as to cover the circumstances of this case. The expression is used in relation to a berth—that is, it is assumed that the vessel will be in a safe berth and it is contemplated that, notwithstanding the safety of the berth, the weather may interfere with the actual work of loading.

That point therefore fails and the consequence of its failure is that the familiar principle of law has, prima facie, to be applied. That principle is conveniently stated in *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*,[1] upon which Mr. MacCrindle relied. Pollock M.R. in his judgment said[2]: " The contract contained in the charterparty is absolute " —that is the contract with the charterer to load within the lay days—" It contains the phrase: ' The laying days shall commence " ' from the time the steamer is ready to receive or discharge " ' her cargo . . . berth or no berth.' Hence the vicissitudes " which are incurred are prima facie deemed to be at the risk " of the charterers. . . . The rule as to liability generally is stated " . . . by Lord Finlay[3] as follows: ' If the charterer has agreed " ' to load or unload within a fixed period of time . . . he is " ' answerable for the non-performance of that engagement, what- " ' ever the nature of the impediments, unless they are covered " ' by exceptions in the charterparty or arise through the fault " ' of the shipowner or those for whom he is responsible.' "

It was sought to argue in the present case that the charterers could be excused on a principle which was set out in Scrutton on Charterparties, 11th ed., p. 342, in the following terms: " If the " ship has to be removed from the port, or becomes unfit for " loading or discharging, e.g., by reason of a collision, the period " of such removal or unfitness will be cut out from the period of " demurrage." That statement of law was held by the Court of

[1] [1925] 2 K.B. 172; 41 T.L.R. 355.

[2] [1925] 2 K.B. 172, 196.

[3] *Alexander & Sons* v. *Hansa* [1920] A.C. 88, 94.

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Appeal in *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency* [4] to be incorrect. I mention it because Mr. Eckersley desired to reserve the point for argument in any court in which he is permitted to argue it that that statement which had been adopted by Roche J. in the court below is a correct statement of law. But he has, of course, accepted that I am bound by the decision in the Court of Appeal. The result is, therefore, that there being nothing in this charterparty which gives the charterers an express exception to the lay time clause, they must show that failure to load within the lay time arose through the fault of the shipowner or those for whom he is responsible.

Since the ship was in fact removed in the middle of the loading, it is for the owners to show that the removal was justified. They say it was for two reasons: first, it was necessary for her safety because of the danger of the bore tides and, secondly, the harbour master ordered it. As to the first, the charterers reply that it was not necessary for the safety of the cargo and therefore not justifiable. As to the second, they say that the harbour master's orders had the force of law. The importance of that point is because of the distinction between illegality at the place of performance as illustrated in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* [5] and restraint of princes. Was the loading stopped because it would be illegal to continue with it, or was it stopped simply because the harbour master, as a local authority physically in a position to enforce compliance with his orders, decided that it should be? If the latter, it seems that on the authority of *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency* [6] the lay days would continue to run; but if the former, the position in law is still unsettled, and Mr. Eckersley submits that the point should be decided in favour of the charterers.

Before I deal with these two matters of law, I must consider the relevant findings in the case. There is a composite finding of fact on both points. The umpire clearly found some difficulty in understanding why the harbour master thought that it would be unsafe for the vessel to remain in No. 1 Garden Reach Jetty. In paragraph 12 of the award he says: "I have been referred to "pp. 177–189 inclusive of the Bay of Bengal Pilot, 7th ed. (1940), "but without knowledge of the mooring facilities of the Garden "Reach Jetty the reasons for the harbour master's actions are not "apparent. I find, however, that the harbour master was in the "best position to judge and I accept that he was acting reasonably "and, inter alia, for the safety of the vessel in ordering her away "from the Garden Reach Jetty during the bore tides: also that "the vessel was in a safe position at the buoys in the King George "Dock. The master of the *Maria G* was obliged to conform to "the orders of the harbour master."

[4] [1925] 2 K.B. 172.
[5] [1920] 2 K.B. 287; 36 T.L.R. 456.
[6] [1925] 2 K.B. 172.

These findings are not exactly in point in relation to the two matters I have to consider. The umpire does not find expressly that the threat of the bore tides was such that it was reasonable for the ship to be removed. What he finds is that the harbour master was in the best position to judge and he, the umpire, accepts that he was acting reasonably and, inter alia, for the safety of the vessel in ordering her away from the Garden Reach Jetty during the bore tides. Mr. MacCrindle has invited me to construe that as a finding that, leaving aside the harbour master's order, the act of the shipowner was in the circumstances reasonable in removing the vessel and that the vessel was therefore removed by reason of a cause beyond the shipowner's control, namely, the threat of these tides. I think that I can do so, since the harbour master was in the best position to judge. I am satisfied that, if the case were to go back to the umpire, he would inevitably find that the shipowners were acting reasonably in withdrawing the vessel in accordance with the harbour master's views.

On the other point, Mr. MacCrindle points out that there is no finding about the state of the law in the Port of Calcutta: there is merely a finding that the master of the *Maria G* was obliged to conform to the orders of the harbour master. But, here again, I am prepared to put what I hope is a reasonable interpretation upon the words of that finding, this time in favour of Mr. Eckersley. I think that it means more than that the harbour master gave orders which he could only enforce by whatever physical means there might be at his disposal. I think it is implicit in this finding that the law in the Port of Calcutta was such as to authorize the harbour master to give orders of this character and that failure to comply with the order would have been a breach of the law. From this construction of the case I now approach the two matters of law.

Mr. MacCrindle submits in the first place, that, leaving aside the intervention of the harbour master, if the vessel was removed from the berth because it was reasonably necessary for her safety that she should be removed, even if that was the voluntary act of the shipowner, it was not the fault of the shipowner and consequently it does not prevent the lay time from continuing to run. For that proposition he has relied upon a decision of Channell J. in *Houlder* v. *Weir*.[7] The headnote reads as follows: "Where the taking in of ballast during "the process of discharge of cargo is necessary for the safety of "the ship and of the cargo remaining on board, the fact that the "taking in of the ballast delays the discharge of the cargo does "not relieve the charterer from his obligation to complete the "discharge within the stipulated time." Channell J. dealt with that point[8]: "The remaining question is whether the days on "which the vessel was taking in ballast as well as discharging

[7] [1905] 2 K.B. 267; 21 T.L.R. 505.

[8] [1905] 2 K.B. 267, 271.

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"cargo should be reckoned as whole days or not. I think they "ought. When Lord Esher [9] . . . said that 'if the shipowner "'by any act of his has prevented the discharge, then, though "'the freighter's contract is broken, he is excused,' he was "referring to a case in which the shipowner's act preventing the "discharge was in breach of his obligation to give the charterer "all facilities for the discharge. But here the act of the ship-"owner which delayed the discharge was not a breach of any "obligation of his. The taking in of ballast in the course of the "discharge was a thing necessary to be done. When part of the "cargo has been discharged something must be done to keep "the ship upright for the safety of the remainder of the cargo as "well as of the ship itself. Under those circumstances the case "stands on the same footing as that of the discharge of the cargo "being prevented by some act beyond the control of the ship-"owner, and consequently, though the charterers have been pre-"vented from having the full benefit of those days, they must be "treated as whole days."

The principle that Channell J. is there laying down is not, in my judgment, confined, as Mr. Eckersley would have me confine it, to cases where what is being done by the shipowner is necessary for the safety of the cargo as well as of the ship. Of course, the safety of the cargo is threatened by any threat to the safety of the ship and that is as much true in this case in relation to the cargo that was on board before she was moved as in the case which Channell J. was considering. But, in my judgment, the principle which Channell J. was laying down is quite independent of that: he is saying that the mere fact that the shipowner had by some act of his prevented the discharge is not enough to interrupt the running of the lay days; it is necessary for the charterers to show also that there was some fault on the part of the shipowner and, if the act of removal by the shipowner or the intervention with the lay days is caused by something that is beyond his control and not his fault, then the lay time is not interrupted. In my judgment, therefore, Mr. MacCrindle is right in his submission that, assuming the act of the shipowner to be a voluntary act, it did not interrupt the running of the lay time.

The other point is whether, having regard to the fact that the ship was moved by the order of the harbour master, it can be said that the loading was prevented by illegality, that is to say, the loading was prevented by the fact that to continue loading would have been a breach of the law of the port of loading, and whether, if that is established, it excuses the charterer. It has not, I think, yet been decided whether or not illegality at the port of loading would relieve the charterers—would prevent the lay time from running. The case that is nearest on the point is the case to which I have already referred, *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*.[10] The decision in

[9] In *Budgett* v. *Binnington* [1891] 1 Q.B. 35, 38.

[10] [1925] 2 K.B. 172.

that case was that the cause of the ship leaving port which prevented her from loading did not amount to an illegality within the principle of *Ralli Brothers* v. *Compania Naviera Sota y Aznar*.[11] The headnote reads: "A charterparty of an Italian "ship provided that 216 running hours (Sundays and holidays "excepted), weather permitting, should be allowed the charterers "for loading and discharging, and that the lay days should com- "mence from the time the steamer was ready to receive or "discharge her cargo, the captain giving six hours' notice to the "charterers' agents, berth or no berth. The exceptions clause "excepted 'restraint of princes, rulers and people.' The ship "arrived at Batoum, and notice of readiness to load was given, "and the lay days began to run. Owing, however, to a dispute "between the Russian and Italian Governments, the ship was "ordered by the port authorities to leave Batoum and also "Russian waters, and accordingly the ship went to Constantinople. "Subsequently permission was obtained to load the ship at "Batoum, and she returned after being absent from the port a "little over a fortnight. The owners subsequently claimed "demurrage from the charterers, on the basis that the lay days "continued to run during the period the ship was absent from "Batoum: *Held*, by the Court of Appeal . . . (1) That the lay "days continued to run notwithstanding that the ship was "compelled to leave the port by order of the port authorities."

If the order of the harbour master in the present case had been a purely executive act, I think that Mr. MacCrindle could have relied upon *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency* [12] as covering it. But I think that Mr. Eckersley is right in his submission that the decision in *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency* turns on the finding or on the view of the Court of Appeal that the orders that were there given to the ship were purely executive orders and had nothing to do with the state of law at the port of Batoum and that it was on that ground that the decision in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* [13] was distinguished. The orders that were given by the port authorities were given in response to a command by the Russian Government and they were, I think, really an act of the sovereign authority of the Government and depended for their virtue upon the sovereign authority of the Government within the ports of its own country and not upon any particular provision of the law in force at Batoum. I think that that is a fair ground of distinction and consequently the question of illegality, which depends on the law in force at the place of loading, did not arise and was indeed expressly reserved by Atkin L.J.[14] I shall not decide it because I think that Mr. MacCrindle can succeed on a simpler ground.

Assuming that the law made it an offence for the charterers to

[11] [1920] 2 K.B. 287; 36 T.L.R. 456.

[12] [1925] 2 K.B. 172.

[13] [1920] 2 K.B. 287.

[14] [1925] 2 K.B. 172, 210.

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attempt to load during the six days in which the vessel was removed from the berth, Mr. MacCrindle argues that that was not the cause of the charterers' failure to load within the lay days. What he submits is, that, put at its highest, if illegality is an excuse at all it must operate on the loading. The law that is relied upon must be a law that prevents the loading of the vessel—the act of loading. It is not enough to point to a law which makes it an offence to load the vessel during a particular part of the lay days, however large a part they may be, and to say that that prevents the loading of the vessel. What is prevented is not the loading of the vessel, but the loading of the vessel within a particular time that is prescribed by the charterparty. That point was considered by Sellers J. in *S.S. Induna Co. Ltd.* v. *British Phosphate Commissioners*,[15] in which the law in force at the port of discharge made it illegal to work at night time between 9 p.m. and 8 a.m. The consequence of that was that it became impossible for the ship to discharge at the prescribed rate and, therefore, to complete the discharging within the lay days. Sellers J. dealt shortly with that point and said[16]: "The case of *Ralli Brothers* v. *Compania Naviera Sota y Aznar*[17] was quoted to support an argument that the illegality of night discharging could be relied on. In my opinion that case has no application. The contract provided for discharge at the rate of 1,500 tons per working day of twenty-four hours, and it was not illegal to discharge at that rate if it could have been done." I respectfully follow and adopt that statement of law and I am unable to distinguish the position here from the position in Sellers J.'s case in any of the ways in which Mr. Eckersley has invited me to do so. In that case a period was, as it were, taken out of the lay days because every night was removed. It was not a continuous period as it is here where six days continuously were removed. But the principle appears to me to be the same and the point is, I think, entirely covered by what Sellers J. said.

The result is that the charterers have failed to discharge the ship within the lay days and have failed to show any ground which excuses them from the performance of their contract. Therefore I answer the question of law stated in the case in the affirmative and, consequently, I uphold the award.

Award affirmed.

Solicitors: *Holman, Fenwick & Willan; Sinclair, Roche & Temperley.*

[15] [1949] 2 K.B. 430; 65 T.L.R. 149; [1949] 1 All E.R. 522.

[16] [1949] 2 K.B. 438.

[17] [1920] 2 K.B. 287.

[COURT OF APPEAL.]

GREY AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

[1957 No. 52.]

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April 15, 16, 17; *May* 15.

Lord Evershed M.R., Morris and Ormerod L.JJ.

Revenue—Stamp duty—Gifts inter vivos—Oral settlement—Settlements in favour of grandchildren—Transfer of company shares to trustees as nominees—Oral direction to trustees to hold shares on trusts of settlements—Subsequent declarations of trust by trustees—Whether voluntary dispositions liable to ad valorem duty—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 8), *s.* 74—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*).

Assignment—Equitable—"Disposition" of equitable interest required to be in writing—Meaning of "disposition"—Oral declaration by cestui que trust directing trustees to hold his interest on new trusts—Law of Property Act, 1925, *s.* 53 (1) (*c*).

In 1949 H. made five settlements, one in favour of each of his five grandchildren, and in 1950 he made a sixth settlement on his then existing and possible after-born grandchildren. The appellants were the trustees of each of these settlements. On February 1, 1955, H. transferred to the appellants, as his nominees, 18,000 ordinary £1 shares in a company. On February 18, 1955, H. orally and irrevocably directed the appellants thenceforth to hold the shares transferred to them on February 1, as to five blocks of 3,000 shares each on the trusts respectively of the five settlements executed in 1949 and as to 3,000 shares on the trusts of the settlement of 1950, to the intent that such direction should result in the entire exclusion of H. from all future right, title and benefit to or in the shares and the income thereof.

On March 25, 1955, the appellants executed six declarations of trust which H., although not expressed to be a party thereto, executed. They were all in similar form and each recited that the appellants were the holders of 3,000 shares in the company, H.'s oral direction of February 18, the acceptance of the trust reposed in them by that oral direction and that the giving of the direction and its nature were testified by the execution by H. of the deed. The operative part of each deed declared that the appellants acknowledged and declared that they were holding the shares on the trusts of the settlement to the intent that the shares should form part of the trust fund.

The six declarations of trust were assessed to ad valorem stamp duty as voluntary dispositions within section 74 of the Finance (1909–10) Act, 1910:—

Held (Lord Evershed M.R. dissenting), that the directions given to the trustees on February 18, though not operating as an assignment of H.'s equitable interests, were a purported "disposition" of them within the meaning of section 53 (1) (*c*) * of the Law of Property Act, 1925, and because they were not made in writing, as required by that provision, they were ineffective.

The word "disposition" in the section must be given its wide meaning in normal everyday usage.

* Law of Property Act, s. 53 (1): "... (*c*) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorized in writing or by will."

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(2) That the declarations of March 25 were effective and were chargeable to the assessed ad valorem stamp duty.

Per Lord Evershed M.R. Judged against the general background of the characteristics of equitable interests the direction of February 18 was distinct in both form and substance from an assignment; it no more was or involved a "disposition" of a subsisting equitable interest than did a formal declaration of trust by an absolute proprietor of property and, accordingly, like such a declaration of trust, it could take effect without writing. Not being itself a "disposition" within the meaning of section 53 (1) (*c*) of the Law of Property Act, 1925, it did not have to be treated as such because it had the incidental result of overriding an existing equitable interest.

Per Ormerod L.J. "Disposition" in section 53 (1) (*c*) should not be restricted to "grants and assignments" within the meaning of section 9 of the Statute of Frauds, 1677.

Decision of Upjohn J. [1958] Ch. 375; [1958] 2 W.L.R. 168; [1958] 1 All E.R. 246 reversed.

APPEAL from Upjohn J.

This was an appeal by the Crown from a decision of Upjohn J. made on December 3, 1957, allowing an appeal by Arthur William Grey and Leslie Richard Randolph from an assessment of the Inland Revenue Commissioners, who had assessed six declarations of trust dated March 25, 1955, to ad valorem duty as voluntary dispositions within the meaning of section 74 of the Finance (1909–10) Act, 1910.

The following facts appear from the case stated: The appellants are the trustees of six settlements, five made in 1949 and one in 1950, each made by Edward William Hunter as settlor of the one part and the appellants of the other part, directing the appellants to stand possessed of property comprised in the settlement on certain trusts declared for a named grandchild of the settlor, with the exception of the sixth settlement made in 1950 which was in favour of the settlor's then existing and certain other grandchildren who might thereafter be born.

On February 1, 1955, Hunter by an instrument of transfer of that date transferred to the appellants 18,000 ordinary shares of £1 each in Sun Engraving Co. Ltd. These shares were to be held by the appellants as nominees for and to the order of Hunter. This transfer was stamped with the duty of ten shillings following a certificate by the parties thereto that no beneficial interest passed thereunder.

On February 18, 1955, a meeting took place at the offices of the company at which there were present Hunter, the appellants and the senior partner in a firm of [solicitors]. At this meeting Hunter orally and irrevocably directed the appellants thenceforth to hold the said shares which he had transferred to them on February 1, 1955, and the income thereof [as to five blocks of 3,000 shares each upon the trusts respectively of the five settlements executed in 1949 in favour of his respective grandchildren, and as to 3,000 shares on the trusts of the settlement of 1950] to the intent that such direction should result in the entire

exclusion of Hunter from all future right, title and benefit to or in the said shares or any of them and the income thereof.

On March 25, 1955, Hunter and the appellants each executed the six deeds called declarations of trust. . . . The deeds were each drawn in similar form. Each deed recited that the appellants were the holders of 3,000 ordinary shares in Sun Engraving Co. Ltd., that on February 18, 1955, Hunter gave the oral direction referred to above, that the appellants assented to and accepted the trusts reposed in them by the direction of Hunter and that the giving of such direction on February 18, 1955, and in manner hereinbefore referred to and the nature thereof were testified by the execution by Hunter of the deed. It was then witnessed by each deed and the appellants thereby acknowledged and declared that they had been since February 18, 1955, and were then holding the said 3,000 shares therein referred to and the income thereof upon such trusts and with and subject to such powers and provisions as were in the relevant settlement declared and contained concerning the trust fund as therein defined or such of the same trusts powers and provisions as were then or might thereafter be subsisting or capable of taking effect to the intent that the said shares should since February 18, 1955, form an addition to and be one fund with the said trust fund for all purposes. [Copies of the deeds were annexed to the case and the terms are set out in the judgment of Morris L.J.]

It has been agreed between the appellants and the commissioners that the value of each of the ordinary shares of £1 each in Sun Engraving Co. Ltd. was £3 10s. on March 25, 1955.

The commissioners were of the opinion that each of the instruments presented for adjudication was a conveyance or transfer by Hunter of his equitable interest in the shares referred to in that instrument and that such conveyance or transfer was a conveyance or transfer operating as a voluntary disposition inter vivos within the meaning of section 74 of the Finance (1909–10) Act, 1910, and was liable to ad valorem duty. . . . They accordingly assessed the duty with which each of the said instruments was chargeable at the sum of £210 ad valorem duty. . . . The appellants contended that each of the instruments presented for adjudication was no more than a record under seal of what had already taken place, that it was not a conveyance or transfer operating as a voluntary disposition inter vivos and that each instrument was chargeable with a fixed duty of ten shillings only under the head of charge "Declaration of any use or trust" in the First Schedule to the Stamp Act, 1891.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Crown.

J. H. Pennycuick Q.C. and *W. T. Elverston* for the taxpayers.

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The following cases in addition to those referred to in the judgment were cited in argument: *Richards* v. *Delbridge* [1]; *Fuller* v. *Inland Revenue Commissioners* [2]; *Brandt's (William) Sons & Co. Ltd.* v. *Dunlop Rubber Co. Ltd.* [3]; *Paterson* v. *Murphy* [4]; *Edwards* v. *Jones* [5]; *Wheatley* v. *Purr* [6]; *Lambe* v. *Orton* [7]; *In re Hamilton.* [8]

Cur. adv. vult.

May 15. The following judgments were read.

LORD EVERSHED M.R. The question presented for the determination of the court by the Commissioners of Inland Revenue in their case stated under section 13 of the Stamp Act, 1891, is whether instruments, self-inscribed as "declarations of trust," are liable to be charged with stamp duty, ad valorem, calculated by reference to the parcels of shares to which they respectively relate. The question so posed requires an answer to the inquiry: Are these several instruments chargeable as "conveyances or "transfers operating as voluntary dispositions inter vivos" within the scope and language of section 74 of the Finance (1909–10) Act, 1910, the relevant portion of which Act must, by the terms of its 96th section, be read and construed as one with the Stamp Act, 1891?

But, as Mr. Wilberforce pointed out at the beginning of his opening of the appeal on behalf of the Crown, the form of the question presented by the case stated disguises, as not uncommonly is so in stamp duty cases, the true nature of the problem raised. Though we were referred to sections of the Stamp Act containing definitions (e.g., sections 54 and 62), nothing in truth turns upon the language or effect of section 74 of the Finance (1909–10) Act, 1910. If the instruments in question alone constitute or alone effectively declare the trusts upon which the several shares are now held (as it is of the essence of the Crown's argument that they do), then it is not in doubt that they fall within the ambit of section 74. Mr. Pennycuick, for the named trustees in the instruments (respondents in this court), so concedes; and it is in the obvious interest of the trustees and their beneficiaries that he should do so. We were concerned during the argument to be satisfied that the court could safely and properly accept the result of the concession; for it seemed that, on one view of the case (if the trustees' argument were not acceptable) then the final effect of the transaction before us (including the instruments in question) might be merely negative, so that no effective trusts had been constituted at all. For reasons which it will be more convenient to state after the facts have been set forth, we were so satisfied. If the trustees' argument, which

[1] (1874) L.R. 18 Eq. 11.
[2] [1950] 2 All E.R. 976.
[3] [1905] A.C. 454; 21 T.L.R. 710.
[4] (1853) 11 Hare 88.
[5] (1836) 1 My. & Cr. 226.
[6] (1837) 1 Keen 551.
[7] (1860) 1 Drew. & Sm. 125.
[8] (1921) 124 L.T. 737.

Upjohn J. accepted, is not well founded, then the instruments are taxable under section 74. But, as I have said, the conclusion does not at all depend upon the solution of any question presented by the legislation relating to stamp duty. It depends rather upon a much more difficult problem under the general law; in the end of all, upon the question whether certain directions orally given to the trustees by a person, competent by virtue of his interest to give them, which the instruments recited and were according to their language intended to confirm, were effective in law to establish the trusts thereby specified; or whether they constituted "a disposition of an equitable interest or trust sub-"sisting at the time of the disposition" within the terms of section 53 (1) (*c*) of the Law of Property Act, 1925, and so failed of effect through want of writing.

The relevant facts are fully set out in the case stated [as printed above], and are also related by Upjohn J.[1]

[His Lordship stated the facts and continued:] It will be convenient to dispose of the doubt, earlier mentioned, whether the court ought to act upon Mr. Pennycuick's concession if it rejected his main argument. The operative part of each of the declarations of trust witnessed that the trustees acknowledged and declared that they had been since the preceding February 18 "*and are now*" holding the shares upon the specified trusts. The directions given on February 18, 1955, and their intention had been recited; and Mr. Hunter "testified" to the giving of the direction and his intention by executing the instruments: in the circumstances I am satisfied that if the directions were, for want of writing, ineffective on February 18, Mr. Hunter could not after March 25 recall or purport to revoke the beneficial interests arising under the trusts upon which, on that later date, the trustees declared, in his presence, that they held the shares. Whatever might be or have been the effect (if any) of the trustees' acknowledgment or declaration that they had so held the shares since the preceding February 18, it clearly follows, in my judgment, that (on the hypothesis that the oral directions on February 18 had no legal effect) the instruments of March 25, 1955, must have effectively established or constituted the relevant trusts and therefore must, as Mr. Pennycuick conceded, be conveyances or transfers operating as voluntary dispositions inter vivos within the terms of section 74 of the Finance (1909–10) Act, 1910, aided by the definition provisions of sections 54 and 62 (and particularly the latter) of the Stamp Act, 1891.

I return to the main question. It is, to my mind, though difficult, a short one. We were very properly referred to a number of cases, both ancient and modern. But, in the end, the problem will be resolved as the few short questions put to us at the end of their arguments by Mr. Pennycuick and Mr. Wilberforce

[1] [1958] Ch. 375, 376; [1958] 2 W.L.R. 168, 169; [1958] 1 All E.R. 246, 248.

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are answered. It is not in doubt that on February 18, 1955, and immediately before the meeting on that day described in the case stated and recited in the instruments of March 25, 1955, the shares were vested in the trustees as registered proprietors; but the trustees held the shares upon trust wholly for Mr. Hunter, who was entitled, absolutely, to all the benefits belonging to them. The subject-matter being shares in a company, the right to transfer them depended upon the company's regulations; but, subject to those regulations, the trustees would be bound to deal with the shares and all the benefits attached to them as Mr. Hunter required. Those rights, which Mr. Hunter had in personam against the trustee, would be enforced, if necessary, by the courts. But, as Lord Parker pointed out in his speech in *Sinclair* v. *Brougham*,[2] equitable rights, though in origin they may have been rights in personam only, have come to acquire the characteristics of proprietary rights. In that sense, therefore, Mr. Hunter no doubt had an equitable interest in the shares, proprietary in character, of which, as such, he was capable of "disposing." He was undoubtedly capable, in the eye of the law, or other (perhaps) of equity, of assigning such "rights," such "interest" to another or others, wholly or in part; and if he desired or purported so to do, it is no less undoubted that, by the terms of section 53 (1) (*c*) of the Law of Property Act, 1925, writing would be required to give effect to his desire.

Is that what Mr. Hunter purported to do on February 18, 1955? Mr. Wilberforce says "Yes." According to his argument, that is the sole question and that is the inevitable answer; for, by doing what he did, he purported to "dispose of," that is, to get rid of, all his beneficial rights. Moreover, the beneficial interests of those entitled under the declared trusts amounted, in sum, to the whole beneficial interest in the shares: that is, to that which formerly had belonged to Mr. Hunter. So (if this argument is right) the answer to the question put during the argument by Morris L.J.: "if Mr. Hunter on February 18, 1955, "purported to make a disposition, to whom and of what did he "dispose?" must be: "to the beneficiaries under the trust and "of the whole beneficial interest."

On the whole, I have come to the conclusion that this analysis, for all its attraction, is an over-simplification and ought not to be accepted.

It was conceded in argument, and cannot in my judgment be doubted, that it is competent for an owner of personal property to declare himself effectively by word of mouth a trustee of the property for another (see *per* Lord Lyndhurst L.C. in *M'Fadden* v. *Jenkyns*[3]). Such a declaration did not require writing for its efficacy according to section 9 of the Statute of Frauds; nor, in my judgment, is the situation altered by virtue of the repeal of that section and the substitution for it of

[2] [1914] A.C. 398, 441; 30 T.L.R. 315.

[3] (1842) 1 Phillips 153, 157.

section 53 (1) (*c*) of the Law of Property Act, 1925. True, where A is legally and beneficially the owner of the property, there is no room for the subsistence of an equitable interest in him distinct from the "legal" title. Still, if A declares himself a trustee of the property wholly for B, he may, in common sense and common terminology, be said to have "got rid of," that is "disposed of," his former subsisting beneficial interest.

It is also clear that equitable interests have the characteristic that they may be lost, defeated or destroyed in certain circumstances not involving, sensibly, any distinct dealing with or disposition of them. One example was given by Lord Parker in the passage above-quoted from his speech in *Sinclair* v. *Brougham* [4]; where the rights of the equitable owner are defeated upon a purchase for value of the legal estate by one without notice of the equitable interest. Another instance is the defeasance of a subsisting vested interest by the exercise of a special power of appointment.

From these instances it follows in my judgment that a subsisting equitable interest may be "disposed of" (in the popular sense of being got rid of), though it is not the subject of any "surrender" in favour of the holder of some other interest out of which the subsisting interest is derived, or on which it is dependent; and though it is not the subject of any assignment or of any dealing with it as a distinct subject-matter and as a continuing entity.

The true nature of what was done or purported to be done on February 18, 1955, has to be judged, in my view, in the light of what is said above. One other proposition may also be asserted. If property be vested in A upon trust, absolutely, for B, then B, in addition to his power of assigning his equitable interest and his power of declaring himself a trustee of it for C, may effectively direct A to hold the property—that is, the property itself and all interests therein—upon trust for C. That indeed, as Mr. Pennycuick pointed out, is in accordance with common form in settlements where at the date of the settlement the property (that is, the legal estate in it) has already been transferred to the trustees and where by the settlement the beneficial owner directs the trustees and declares the trusts upon which the property itself is to be held. The decision of Sir John Romilly M.R. in *Tierney* v. *Wood* [5] may be cited as authority for the general proposition.

The validity of the proposition does not, however (nor did the decision in *Tierney* v. *Wood* [5]), determine the question whether such a declaration of trust by way of direction on the part of the beneficial owner required or requires writing under section 9 of the Statute of Frauds or section 53 of the Law of Property Act. Such a method of dealing with a beneficial interest in personal property (with which alone we are concerned) appears, however, to have been regarded as distinct from both an assignment, on the

[4] [1914] A.C. 398, 441.

[5] (1854) 19 Beav. 330.

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one hand, and a declaration of trust of the interest in the beneficial owner's hands, on the other. See, for example, *per* Romer L.J. in *Timpson's Executors* v. *Yerbury*,[6] and *In re Chrimes*.[7] In *Timpson's* case[8] Romer L.J. said: "Now the "equitable interest in property in the hands of a trustee can be "disposed of by the person entitled to it in favour of a third "party in any one of four different ways. The person entitled to "it (1) can assign it to the third party directly; (2) can direct "the trustees to hold the property in trust for the third party "(see *per* Sargant J. in *In re Chrimes*[9]); (3) can contract for "valuable consideration to assign the equitable interest to him; "or (4) can declare himself to be a trustee for him of such "interest." But in neither case was the question involved with which we are concerned. Nor indeed does that question appear to have been directly the subject of any judicial decision, though Mr. Wilberforce has relied upon certain language used in *In re Chrimes*,[9] and also more particularly upon the language used by Rowlatt J. in *Martin* v. *Inland Revenue Commissioners*,[10] to support his argument that such a direction to the trustees and legal owner by the beneficial owner, even if it be in form distinct, nevertheless has the effect of, or necessarily involves, an "assign-"ment" or at least "a disposition of an equitable interest "subsisting at the time of the disposition" within the meaning of section 53 (1) (*c*) of the Law of Property Act, 1925. The question for us is whether that submission is correct: and it must, I apprehend, be answered, in the absence of any direct authority, upon principle.

I am not prepared to dissent from the negative answer which Upjohn J. gave to the question. In other words, judged against the general background of the characteristics of equitable interests, I think on the whole that a direction of the kind given in the present case by Mr. Hunter is something distinct, not only in form, but also in substance, from an assignment; that it no more is or involves a disposition of a subsisting equitable interest than does a formal declaration of trust by an absolute proprietor of personal property, and accordingly that, like such a declaration of trust, it may take effect without writing. In form there can be no doubt that it is more closely analogous to such a declaration of trust than it is to an assignment. Indeed it is, in form, such a declaration, since it declares the trusts upon which the legal owner is to hold the property as, admittedly, it is within the province of the beneficial owner to do. In the present case the events of February 18, 1955, are found in paragraph 5 of the case stated. "Mr. Hunter orally and irrevocably directed the" (trustees) "thenceforth to hold the . . . shares . . . and the "income thereof" upon the trusts in the paragraph more

[6] [1936] 1 K.B. 645, 664; [1936] 1 All E.R. 186.
[7] [1917] 1 Ch. 30.
[8] [1936] 1 K.B. 645, 664.
[9] [1917] 1 Ch. 30.
[10] (1930) 15 A.T.C. 631; also reported in Sargeant on the Stamp Acts, 3rd ed., p. 350.

particularly specified; and the instruments of March 25, 1955, contained recitals to the same effect coupled with acknowledgments and declarations by the trustees that they had so held the shares since the preceding February 18. Some significance should, in my view, be given to the use of the word "irrevocably." For, if, as Mr. Wilberforce contends, the transactions of February 18 purported to constitute an "assignment" of Mr. Hunter's equitable interest to the beneficiaries under the specified trusts, it is to be observed that no notice was given to any of such beneficiaries. In the absence of such notice it may be forcefully contended that any "assignment" might thereafter have been recalled by Mr. Hunter.

I have not, accordingly, been persuaded that there is any principle of law or equity which prevents the transaction of February 18, 1955, being in substance as well as form other than it, upon its face, purported to be and from taking effect accordingly—namely, as a direction to the trustees declaring the trusts upon which they should hold the property: and if the result (assuming its efficacy) was to defeat or override the pre-existing beneficial rights of Mr. Hunter, that result was an incidental consequence, but did not involve or amount to the transaction becoming that which in terms Mr. Hunter clearly did not intend, namely, an assignment to anyone, or a disposition in anyone's favour, of those beneficial rights.

I am therefore, for my part, prepared to accept the analysis of the problem put at the end of his argument by Mr. Pennycuick in the form of four questions and to accept also Mr. Pennycuick's answers to the questions. The questions and their answers are as follows: (1) Can an equitable owner of property declare trusts of the property itself? Answer: "Yes." (2) Did Mr. Hunter express himself on February 18, 1955, as declaring trusts of the shares of which he had the beneficial ownership? Answer: "Yes." (3) Is a declaration of the trusts upon which property is to be held a disposition of a subsisting equitable interest in that property? Answer: "No." (4) Is such a declaration of trust, though not itself such a disposition as mentioned in question (3), to be treated as such because it has the incidental result of overriding an existing equitable interest? Answer: "No."

In *In re Chrimes* [11] the question presented to Sargant J. was whether the plaintiff, being at the relevant time entitled to a reversionary interest under a will subject to a restraint upon anticipation, had, by a deed poll executed while she was a spinster, successfully imposed new trusts upon her reversionary interest so that she was subject when married only to such (more limited) restraint as was contained in the new trusts. The deed poll, which was addressed to all the world, took the form of a declaration that the trustees of the will should (subject to prior interests and otherwise as therein stated) hold the plaintiff's reversionary

[11] [1917] 1 Ch. 30.

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interest, in the event of her marriage, for her separate use, so that she should have full power to charge or anticipate the same subject to a certain proviso to which I need not further refer. It was conceded in argument that it was competent for one in the plaintiff's situation to defeat the restraint by an assignment of her interest while discovert: but it was contended for those impugning the validity of what the plaintiff had done that a similar result could not be achieved by a mere declaration of new or different trusts, as the plaintiff had purported to do by the deed poll.

Sargant J., in deciding for the plaintiff, said that, if the distinction above mentioned was well founded, what the plaintiff had done in any case constituted a complete assignment. But he later added [12]: "Now it is well established that in the case of "an equitable interest outstanding in trustees or other holders "a voluntary direction by the owner to the trustees or holders "to hold the whole or part of that interest upon trust for a third "person operates as a complete and effectual transfer of the "interest to which the direction extends." That was followed by a reference to (among other cases) *Tierney* v. *Wood*.[13] This passage was referred to by Upjohn J., but its use by the judge was forcefully invoked by Mr. Wilberforce as disclosing a fallacy in his reasoning. For the cited passage was, according to Mr. Wilberforce, authority for the view that a direction to trustees in relation to the trust property by one entitled by virtue of his interest in the trust property to give it, operated, necessarily, as a "transfer," in the sense of an assignment (total or partial according to the extent of the direction) of his beneficial interest.

There is no doubt that Sargant J. held, and intended to hold, that the plaintiff's deed poll in *In re Chrimes* [14] operated as an "assignment" of her reversion: and I am not to be taken as casting any doubt upon the correctness of that view. But the vital question with which we are concerned, the construction of section 53 (1) (*c*) of the Law of Property Act, was not and could not, for obvious reasons, have been in the judge's mind. Nor was the corresponding question under section 9 of the Statute of Frauds (i.e., whether such a "direction" as the plaintiff gave by declaring trusts in her deed poll required to be in writing) since it was, in fact, written. It is to be noted, too, that at the date of the deed poll the plaintiff's interest under the trusts was a limited interest, that of a reversioner, subject to subsisting life interests. She had no power to give directions to the trustees comparable to that which Mr. Hunter had on February 18, 1955. Finally, the passage cited is not entirely clear in all respects, and Mr. Wilberforce himself invited us to suppose that words to the effect "in property, the legal estate in which" had been per incuriam omitted after the words "equitable interest."

[12] [1917] 1 Ch. 30, 36, 37.
[13] 19 Beav. 330.
[14] [1917] 1 Ch. 30.

Martin's case [15] at first sight more nearly approximates to the present case. The essential facts were that Mr. Martin, having first transferred certain freehold property and the benefit of a mortgage to other persons without conferring upon them any beneficial interest (so that they held the property upon trust absolutely for himself), after a short interval, and by deed, declared trusts of the property in the trustees' hands. The relevant question was whether the second deed constituted a conveyance operating as a voluntary disposition inter vivos within the meaning of section 74 of the Finance (1909–10) Act, 1910; and that question Rowlatt J. answered affirmatively.

Again, however, the question with which we are concerned (namely, whether a direction or declaration of trust made in circumstances comparable to those of Mr. Martin amounts to a disposition of a subsisting equitable interest within section 53 (1) (*c*) of the Law of Property Act) did not, of course, arise. Rowlatt J. held the declaration to have operated as a voluntary disposition within section 74 of the Finance (1909–10) Act, 1910; and, as I have earlier stated, it is conceded in the present case that if the operation of the relevant trusts must be related to the instruments of March 25, 1955, those instruments are likewise chargeable with ad valorem duty. *Martin's* case [15] does not, in my judgment, assist the Crown in the present case.

Mr. Justice Upjohn referred also in his judgment to his own earlier decision in *In re Wale*,[16] as having been relied upon before him by the Crown. The question in *In re Wale* [16] was, however, widely different from that before us. The present question was not at all raised. It is sufficient for me to say that, once again, nothing in *In re Wale* [16] assists the solution of the present problem.

That problem must indeed be determined, as I have said, as a matter of principle uncovered by any authority. It is, whether the directions given on February 18, 1955, amounted in law to a disposition of a subsisting interest within the meaning of section 53 (1) (*c*) of the Law of Property Act, 1925. In the end of all it depends, briefly and simply, upon the significance in the context of that subsection of the word "disposition." The section reproduces sections 3, 7, 8 and 9 of the Statute of Frauds which were, by the Act of 1925, repealed. Paragraph (*b*) of the Law of Property Act subsection follows fairly closely the terms of the repealed section 7 of the Statute of Frauds. On the other hand, the language of paragraph (*c*) in the Act of 1925 departs substantially from that of section 9 of the Statute of Frauds, which reads (so far as relevant): "... all grants, and assignments of "any trust or confidence shall likewise be in writing ... or else "shall ... be utterly void and of none effect."

If the present question had arisen for determination under

[15] (1930) 15 A.T.C. 631.

[16] [1956] 1 W.L.R. 1346; [1956] 3 All E.R. 280.

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section 9 of the Statute of Frauds, it is, in my judgment, reasonably clear that it would have been answered in the same sense as in Upjohn J.'s judgment: for the transactions of February 18, 1955, could not, to my mind, have been sensibly described as constituting, or operating as, a grant or assignment of a trust or confidence—particularly bearing in mind the established law that a trust of personalty could be effectively declared by parol. Has the law been altered by the replacement of section 9 of the Statute of Frauds by section 53 (1) (*c*) of the Law of Property Act? No doubt, as Mr. Wilberforce observed, proper effect must be given to a change of language, even though the expressed purpose of the new enactment be that of consolidation only of the existing law. (See Craies on Statute Law (1952) 5th ed., at p. 333 and onwards.) Still, in such a case, the court may, in my judgment, properly prefer that interpretation, if fairly open, which more closely reflects the scope of the replaced enactment; and more particularly, perhaps, where, as in the present case, the language of the repealed statute might in modern times appear somewhat archaic.

Upjohn J. pointed out at the end of his judgment that the word "disposition" is one of wide import, general rather than precise. Many contexts could no doubt be found in which the word or its derivatives would cover any means whereby the owner of any right or property succeeded in getting rid of that which he formerly enjoyed. But if the word bears this widest significance, then does the validity of a parol declaration of trust of personalty now survive? As Upjohn J. observed, if the section has worked such a change in the law, it has not been noticed in any of the well-known textbooks. The meaning of the word must be discerned from and, as I think, limited by the context of the succeeding words "subsisting at the time of the disposition." It is said that the presence of these words is apt to save the parol declaration of trust. But in the case at any rate of such a declaration by one who is the owner beneficially of property, the legal estate in which is vested in another as trustee for him—what is referred to in the American Restatement (1935) "Trusts" edited by Professor Austin Scott of Harvard University, as "sub-trusts"—the practical effect would seem, in common sense, to amount, or to be capable of amounting, to the "getting rid of" a trust or equitable interest then subsisting. If, therefore, the word "disposition" ought in its context to be so limited as to exclude such a declaration, it should also in my judgment (having due regard to the pre-existing law and to the characteristics of equitable rights or interests to which I have earlier referred) be construed so as not to cover a transaction such as the present which, though it may result in the destruction or defeasance of subsisting equitable rights, is not in form or (as I think) in reality apt or directed to constitute any dealing with those rights.

It remains for me to say something of the judgment of Upjohn J. with which I am respectfully in agreement. The judge thus

expounded his conclusion: "In my judgment a direction to "trustees to hold trust property upon trust for a donee operates "as a transfer of the equitable interest to the donee by way of "trust and not by way of assignment." Elsewhere the judge similarly uses the word "transfer," which may have been derived from its use by Sargant J. in the passage above quoted from *In re Chrimes*.[17] The use was seized upon by Mr. Wilberforce as indicating that Upjohn J. had in some sense misapprehended the essential point for his decision. But I agree with Mr. Pennycuick that in its context the judge used the word in a special sense indicating that the equitable rights had in effect been displaced or transposed, and meaning something wholly distinct from "disposition" in the sense of an assignment or direct dealing with an interest, the defined identity of which survives, recognizably, the dealing. So much, indeed, clearly appears from the final words of the passage from the judgment which I have quoted. Any other view would be wholly destructive of the reasoning and logic of the judgment.

For the reasons which I have tried to state, I would, if the matter rested with me, dismiss the appeal. But my brethren, whose judgments I have had the advantage of reading in advance, have reached an opposite conclusion. The sole essential question is, as I have more than once said, an extremely short one. As my brother Morris L.J. observes in his judgment, what Mr. Hunter did and intended to do on February 18, 1955, was neither an assignment by him of his beneficial interest, nor a declaration of trust of that interest. It was a direction to the trustees which, by reason of the power to direct, which he had, put an end to his beneficial rights. Was it, therefore, a disposition by him of an equitable interest subsisting at the time of the disposition? That is the one question which can be shortly and simply stated. I would answer the question negatively, but my brethren think that it should be answered affirmatively. In the result, the appeal must be allowed.

MORRIS L.J. (read by Lord Evershed M.R.). This is an appeal from the judgment of Upjohn J., whereby he allowed an appeal by way of case stated under section 13 of the Stamp Act, 1891, from assessments to ad valorem duty made by the Inland Revenue Commissioners in respect of six instruments each made on March 25, 1955, and each called a declaration of trust. The commissioners were of opinion that each of the instruments was a conveyance or transfer operating as a voluntary disposition inter vivos within the meaning of section 74 of the Finance (1909–10) Act, 1910.

[His Lordship referred to the facts set out in the case stated, reading the terms of the declarations of trust of March 25, 1955, as follows:] In each one the opening words are as follows: "This declaration of trust is made March 25, 1955, by . . . [the

[17] [1917] 1 Ch. 30.

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" trustees]." Each then recited that prior to February 18, 3,000 shares were held as nominees for and to the order of Mr. Hunter. There was a recital of what had been done on February 18 with the assertion that the direction given " did immediately result in " the entire exclusion of Mr. Hunter from all future right title " and benefit to or in the said shares or any of them and the " income thereof." After further recitals the deed continued: " Now this deed witnesseth and the trustees hereby acknowledge " and declare that they have been since the date of inception and " are now holding the said shares specified in the said schedule " hereto and the income thereof upon such trusts and with and " subject to such powers and provisions as are by and in the said " settlement declared and contained concerning the trust fund as " therein defined or such of the same trusts powers and provisions " as are now or may hereafter be subsisting or capable of taking " effect to the intent that the said shares should since the date " of inception form an addition to and be one fund with the said " trust fund for all purposes.

" In witness whereof the trustees and Mr. Hunter have here- " unto set their hands and seals the day and year first above " written."

It is common ground that if what took place on February 18 had the result that thereafter the six blocks of 3,000 shares each were held by the trustees on the trusts declared by the six respective trusts then no property passed in and by the six " declarations of trust " of March 25, and those instruments would not be chargeable to ad valorem stamp duty. The commissioners submit that the directions of February 18 were ineffective for the reason that they were oral and not in writing. The commissioners submit that the provisions of section 53 (1) (*c*) of the Law of Property Act, 1925, were applicable.

It thus comes about that, though the direct matter for determination is whether the six instruments of March 25 should be assessed to ad valorem stamp duty, the principal issue which arises is whether the provisions of section 53 (1) (*c*) of the Law of Property Act prevented the directions given on February 18 from being effective. If those provisions did not so prevent then no further question now arises and the appeal fails. Before the judge a submission was alternatively made by the commissioners to the effect that the oral directions on February 18 and the subsequent deeds executed on March 25 should be taken and read together. That submission failed and has not been made in this court.

If the provisions of section 53 (1) (*c*) rendered what took place on February 18 ineffective, then the question arises whether the instruments of March 25 were chargeable with ad valorem duty.

Section 74 (1) of the Finance (1909–10) Act, 1910, is in the following terms: " Any conveyance or transfer operating as a " voluntary disposition inter vivos shall be chargeable with the " like stamp duty as if it were a conveyance or transfer on sale,

" with the substitution in each case of the value of the property " conveyed or transferred for the amount or value of the con- " sideration for the sale:

" Provided that this section shall not apply to a conveyance " or transfer operating as a voluntary disposition of property to a " body of persons incorporated by a special Act, if that body is by " its Act precluded from dividing any profit among its members " and the property conveyed is to be held for the purposes of an " open space or for the purposes of its preservation for the benefit " of the nation."

Part V of the Act of 1910 (which part contains section 74) is to be read as one with the Stamp Act, 1891 (see section 96 (5) of the Act of 1910).

Section 62 of the Stamp Act, 1891, is in the following terms: " Every instrument, and every decree or order of any court or of " any commissioners, whereby any property on any occasion, " except a sale or mortgage, is transferred to or vested in any " person, is to be charged with duty as a conveyance or transfer " of property:

" Provided that a conveyance or transfer made for effectuating " the appointment of a new trustee is not to be charged with any " higher duty than ten shillings."

Section 54 of the Stamp Act, 1891, is in the following terms: " For the purposes of this Act the expression ' conveyance on sale ' " includes every instrument, and every decree or order of any " court or of any commissioners, whereby any property, or any " estate or interest in any property, upon the sale thereof is trans- " ferred to or vested in a purchaser, or any other person on his " behalf or by his direction."

From a citation of these sections it becomes clear that there may be a wide range of instruments which become chargeable with duty as conveyances or transfers of property.

The issue which arises calls for an analysis of what took place on February 18. That is necessary in order to decide whether section 53 of the Law of Property Act applies. That section took the place of sections 3, 7, 8 and 9, of the Statute of Frauds, and subsection (1) (*c*) provides as follows: " a disposition of an " equitable interest or trust subsisting at the time of the disposi- " tion, must be in writing signed by the person disposing of the " same, or by his agent thereunto lawfully authorized in writing " or by will."

Section 205 (1) (ii) contains the following definitions: " ' Con- " ' veyance ' includes a mortgage, charge, lease, assent, vesting " declaration, vesting instrument, disclaimer, release and every " other assurance of property or of an interest therein by any " instrument, except a will; ' convey ' has a corresponding " meaning; and ' disposition ' includes a conveyance and also a " devise, bequest, or an appointment of property contained in a " will; and ' dispose of ' has a corresponding meaning."

There is no doubt that between February 1 and February 18

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Mr. Hunter owned the equitable interest in the 18,000 shares. On February 18 he directed the trustees to hold the shares thenceforth in a different way. Instead of holding them for him the trustees were to hold them upon the trusts and with and subject to the powers and provisions declared by and contained in certain settlements.

It has therefore first to be considered what exactly it was that Mr. Hunter did or purported to do on February 18. Did he purport to effect a direct assignment of his existing equitable interest to some third party or parties? It seems to me that he did not. Did he purport to declare himself a trustee for others of his existing equitable interest? Again it seems to me that he did not. Nor did he enter into any contract for valuable consideration to assign his equitable interest to some third party. What he did was to direct the trustees that for the future they were to hold the trust property not for him but on certain trusts which he declared: his equitable interest was to be completely determined.

It is well-established law that a declaration by parol is sufficient to create a trust of personal property (see *M'Fadden* v. *Jenkyns*,[18] *Milroy* v. *Lord* [19]). But the only question which now arises relates to an equitable interest or trust which was subsisting in Mr. Hunter before he gave his oral directions to his trustees on February 18. The limited issue is whether there was a purported "disposition" of Mr. Hunter's interest. If there was then it was ineffective or unavailing for lack of writing.

Mr. Wilberforce submitted that the owner of a subsisting equitable interest, the legal estate being vested in trustees, could make a settlement or trust of that equitable interest by assigning it to trustees to be held upon the new trusts: Mr. Wilberforce further submitted that, if instead of appointing new trustees, the owner directed the existing trustees, who held the legal estate, to hold upon the new trusts, the effect and results of this would be that there would be an assignment to the trustees, the direction being a form of equitable assignment. On this view Mr. Hunter's words on February 18 would have been ineffective had the governing statutory provision been section 9 of the Statute of Frauds.

Out of a wealth of citation of authority no case emerges in which the present point has arisen for decision either under section 9 of the Statute of Frauds or under section 53 of the Law of Property Act.

In *Bentley* v. *Mackay*,[20] no point seems to have been taken in regard to section 9 of the Statute of Frauds. Neither was any point taken in *M'Fadden* v. *Jenkyns*,[21] though that case related rather to the creation of a trust than to any dealing with an existing equitable interest. In *Martin* v. *Inland Revenue Commissioners*,[22] much relied on by Mr. Wilberforce, no point

[18] 1 Phillips 153.
[19] (1862) 4 De G.F. & J. 264.
[20] (1851) 15 Beav. 12.
[21] 1 Phillips 153.
[22] 15 A.T.C. 631.

arose comparable with that now in issue. As section 53 of the Law of Property Act, 1925, is the section which now applies the issue involved is whether Mr. Hunter purported to dispose of his interest. The word "disposition" must be given a normal meaning. The legislature chose to use this word in the new statute. Mr. Wilberforce placed reliance upon some words used by Sargant J. in his judgment in *In re Chrimes*.[23] In speaking of a direction given by the owner of an equitable interest to trustees in whom the legal estate is outstanding Sargant J. said[24]: "A voluntary direction by the owner to the trustees or "holders to hold the whole or part of that interest upon trust "for a third person operates as a complete and effectual transfer "of the interest to which the direction extends." I cannot, however, regard those words as decisive of the present problem.

Mr. Hunter was certainly in a position to declare a trust (as was the case in *Tierney* v. *Wood*.[25] In *Rycroft* v. *Christy*,[26] Lord Langdale M.R., in reference to directions given by a beneficiary, said,[27] "she transferred the trust from herself to the "object she desired to be benefited." The notion of a transfer of the equitable interest is involved both where transfer takes place by way of assignment and where it takes place by way of direction to trustees to hold on trust for a donee or donees. But whatever language may be employed in cases where general principles have been under consideration the short question which here emerges is whether what Mr. Hunter did purported to amount to a "disposition" by him. The word "disposition" is a word of wide signification. Before February 18 Mr. Hunter possessed a subsisting equitable interest in the shares: his purpose and object when he gave his oral direction was to deprive himself immediately and irrevocably of his subsisting personal beneficial interest so that others could and should become beneficially entitled. It was a necessary part of his purpose that he should deal with his personal interest: he terminated it and informed his trustees that they should no longer hold for him but should hold on the substituted trusts which he declared. I cannot resist the conclusion that this was a purported "disposi-"tion" by him of his interest. In *Inland Revenue Commissioners* v. *Buchanan*,[28] a question arose whether a surrender is a disposition. Lord Goddard C.J. said[29]: "I think it clearly is a "disposition. A person can dispose of his interest in a fund or "in a chattel or in anything else in a variety of ways, but if, "having an interest in a fund, although the interest may not "then be in possession, he surrenders that interest, it seems to "me that he disposes of that interest."

I consider that Mr. Hunter purported to effect a disposition but that by reason of section 53 his oral words on February 18

[23] [1917] 1 Ch. 30.
[24] Ibid. 36.
[25] 19 Beav. 330.
[26] (1840) 3 Beav. 238.
[27] Ibid. 241.
[28] [1958] Ch. 289; [1957] 3 W.L.R. 68; [1957] 2 All E.R. 400; 37 T.C. 365.
[29] [1958] Ch. 289, 296.

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were ineffective. The instruments of March 25 were, however, made operative and effective by the parties thereto and were in my judgment chargeable to ad valorem duty as assessed by the commissioners. It is with a natural diffidence that I differ from the opinions of my Lord and of the judge, but I feel constrained to the view which I have expressed and I would allow the appeal.

ORMEROD L.J. I agree with Morris L.J. that this appeal should be allowed. [His Lordship referred to the facts and continued:] It is agreed that the question upon which the appeal turns is whether in the course of the transaction of February 18 he made a disposition of his subsisting equitable interest within the meaning of section 53 (1) (*c*) of the Law of Property Act, 1925. There can be no doubt that up to the moment of the oral direction being made there was a subsisting equitable interest in the shares vested in the settlor. At that moment the equitable interest ceased to be vested in him. Either it was transferred from him to the trustees for them to hold the shares in trust for the beneficiaries or it ceased to exist and a new equitable interest was created in the terms of the direction. If what took place was a transfer of the settlor's interest, then it could not be argued that it was not a disposition within the meaning of the section. I do not think, however, that it was a transfer. It was certainly not in my judgment a transfer which was in the nature of an assignment. The more difficult question is whether the transaction was a "disposition" in spite of the fact that it should not be regarded as a transfer. Mr. Pennycuick has argued that the purpose of what took place on February 18 was that the settlor should give directions to the trustees as to the trusts upon which and the persons for whom they should hold the shares, that the cessation of the settlor's interest was an incidental consequence of this purpose and that he neither intended to effect a disposition of his interest, nor did he in fact do so. I may say at once, that I find it difficult to accept that argument.

I have found little or no assistance from the authorities that have been cited. It is true that Romer L.J. in *Timpson's Executors* v. *Yerbury*[30] says: "Now the equitable interest in "property in the hands of a trustee can be disposed of by the "person entitled to it in favour of a third party in any one of "four different ways," and goes on to specify as one of these ways a direction to the trustees to hold the property in trust for a third party. But the question of the construction of section 53 (1) (*c*) had not arisen in the case, and for my part I do not regard this passage as of assistance in the present case.

The question is whether the word "disposition" should be given the wide meaning that it would seem to have in normal everyday usage, or whether it should have a meaning so restricted as to make section 53 (1) (*c*) of no wider import than section 9

[30] [1936] 1 K.B. 645, 664.

of the Statute of Frauds. That section requires that "all grants "and assignments of any trust or confidence shall likewise be in "writing." If the meaning of the word "disposition" is to be restricted to "grants and assignments," then the case would not in my judgment be within the section.

Mr. Pennycuick has argued that section 53 (1) (*c*) was a consolidation of the existing law and was in effect a re-enactment of section 9 of the Statute of Frauds, and should not be given a wider meaning unless there was a clearly expressed intention that such a meaning should be so given. Mr. Wilberforce, on the other hand, argued that effect must in any event be given to a change of language and that the language of the new section might well be intended to bear a wider construction than the old one, particularly having regard to the change which has taken place in the nature of equitable interests since the passing of the Statute of Frauds. Giving full consideration to the argument that the section is to a large extent a consolidation of the existing law, I have come to the conclusion that the wider construction of the section is the right one. If the intention had been to limit its operation to grants and assignments, I see no reason why the section should not have read "a grant or assignment of an "equitable interest or trust subsisting at the time of the grant "or assignment." The section, however, does not so read. The word "disposition" has been used, and, in my judgment, this word should be given its normal meaning. If this be right there can, I think, be little doubt that the case comes within the section, and the transaction is void for want of writing.

It must be looked at not from the point of view of the new interest which was to be vested in the trustees, but from that of the interest which was vested in the settlor up to the time of the direction being given. This was an interest which he had himself created, apparently for the purpose of being in a position to give the appropriate directions to the trustees at a later date. In order to do this effectively, it was essential that the equitable interest should be vested in him and that it should cease to exist at the time and by reason of the direction. The transaction therefore was one which was, in my judgment, a "disposition" within the meaning of the section of the settlor's equitable interest. He "disposed" or "got rid" of it, by causing it to cease to exist in carrying out the purpose for which he brought it into being.

It follows, in my judgment, that the transaction of February 18 was void and that the declaration of trust of March 25, 1955, is liable to be stamped ad valorem.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor, Inland Revenue; Soames, Edwards & Jones.*

E. D.

[COURT OF APPEAL.]

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April 1, 2, 3, 4;
May 15.

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OUGHTRED *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Stamp duty—Conveyance or transfer on sale—Oral agreement for value for transfer of reversionary interest to tenant for life—Subsequent deed of transfer—Whether oral agreement effective to pass equitable reversionary interest—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*), (2)—*Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 54.

Under and by virtue of a settlement dated January 1, 1924, an appointment dated June 18, 1956, and a release of the same date, a mother was the tenant for life of 100,000 preference shares and 100,000 ordinary shares in a company, and her son was absolutely entitled to the shares subject to her life interest. By an oral agreement made on June 18, 1956, it was agreed between mother and son that the son, on June 26, would exchange his interest under the settlement and subsequent deeds for certain shares in the same company then owned by the mother to the intent that her life interest in the shares subject to the settlement should be enlarged into absolute ownership thereof. On June 26, by a deed of release between the mother, son and the trustees, the mother and son gave release to the trustees. The release recited the oral agreement and that the trust fund, consisting of the shares, "is accordingly now held in trust for [the mother] absolutely," and that it was intended to transfer them to the mother, such transfer being the consideration for the release. On the same day, by a deed made between the mother, son and the trustees, the trust fund of 100,000 preference shares and 100,000 ordinary shares was transferred to the mother in consideration of ten shillings.

Upjohn J. held, reversing the commissioners, that the transfer was not assessable to ad valorem duty.

Held, (1) that in the absence of any finding of fact as to the order in which the deed of release and the two transfers of June 26, 1956, were executed, they should be regarded as having been executed contemporaneously.

(2) That while stamp duty was leviable upon instruments and not upon transactions, the court was not debarred from inquiring what was the true nature and intended purpose of the instrument sought to be charged, and that having regard to the recitals in the deed of release, which was contemporaneous with the transfer, the proper conclusion was that the transfer constituted (as it was intended and contemplated that it should) the completion of the oral bargain made eight days before, and so constituted the conveyance upon and the implementation of the contract for sale of June 18 and, accordingly, the transfer was liable to ad valorem duty as a "conveyance or transfer on sale" within the meaning of section 54 and the First Schedule to the Stamp Act, 1891.

Attorney-General v. *Brown* (1849) 3 Exch. 662 considered.

The application of section 53 of the Law of Property Act, 1925, to the transactions of June 18 and June 26, 1956, by Upjohn J. not approved.

Decision of Upjohn J. [1958] Ch. 383; [1958] 2 W.L.R. 174; [1958] 1 All E.R. 252 reversed.

APPEAL from a decision of Upjohn J.[1]

[1] [1958] Ch. 383; [1958] 2 W.L.R. 174; [1958] 1 All E.R. 252.

Mrs. Phyllis Brown Oughtred (hereinafter called "Mrs. Oughtred") appealed by way of case stated under section 13 of the Stamp Act, 1891, from an assessment of ad valorem stamp duty on a deed of transfer dated June 26, 1956, whereby four transferors were expressed to transfer 100,000 preference shares and 100,000 ordinary shares of 10s. each to Mrs. Oughtred in consideration of 10s.

The case stated, so far as relevant, provided: The transferors were the trustees of a settlement (hereinafter called "the settlement") dated January 1, 1924, and made between George Jackson Bentham, of the one part, and William Edward Cooper, Norman Oughtred, John Alwyn Oughtred, Mrs. Oughtred and Doris Strachan Oughtred, of the other part, whereby certain shares in William Jackson & Son Ltd. were settled upon trust for Mrs. Oughtred during her life, and after her death for such of her issue as she should by deed or will appoint, and, subject to any such appointment, for such of her children who attained the age of 21 years, and if more than one in equal shares and, subject thereto, for Mrs. Oughtred. At all material times the property subject to the trusts of the settlement consisted of 100,000 ordinary shares and 100,000 preference shares in William Jackson & Son Ltd., which prior to the transfer to Mrs. Oughtred were held by the transferors. Mrs. Oughtred was married once only and had one child, Peter Bentham Oughtred (hereinafter called "Peter"), who was living and of age on the date of the transfer to Mrs. Oughtred. By a deed of appointment dated June 18, 1956, and made by Mrs. Oughtred, the trust fund, subject to the trusts of the settlement, was appointed to Peter absolutely, subject to the life interest of Mrs. Oughtred and to the power of revocation reserved in the deed of appointment. By a deed of release dated June 18, 1956, Mrs. Oughtred released her power of revocation. By an oral agreement of June 18, 1956, made between Mrs. Oughtred and Peter it was agreed that Peter would on June 26, 1956, exchange his interest under the settlement and deed of appointment and deed of release for 28,510 fully paid preference shares of 10s. each and 44,190 fully paid ordinary shares of 10s. each in the capital of William Jackson & Son Ltd., then owned by Mrs. Oughtred, to the intent that her life interest in the trust fund should be enlarged into absolute ownership.

By a deed of release made on June 26, 1956, between Mrs. Oughtred of the first part, Peter of the second part, and the trustees of the settlement of the third part, after reciting (inter alia) the oral agreement, that the trust fund consisting of the said 100,000 preference shares and 100,000 ordinary shares was "accordingly now held by the trustees in trust for" Mrs. Oughtred absolutely, that it was intended that the same should forthwith be transferred to her or as she should direct and that Mrs. Oughtred and Peter, being satisfied with all matters and things relating to the execution of the trusts of the said settlement, had agreed to make the release thereinafter contained,

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Mrs. Oughtred and Peter released and discharged the transferors from all actions, proceedings, claims and demands in respect of the execution of the said settlement. By the transfer to Mrs. Oughtred the transferors transferred to her the 100,000 ordinary shares and 100,000 preference shares, and on the same date she, by the direction of her son Peter, transferred to Donald Miller Jones and Noel Oughtred Till 28,510 first preference shares of 10s. each and 44,190 ordinary shares of 10s. each in William Jackson & Son Ltd. Donald Miller Jones and Noel Oughtred Till were trustees of a trust deed dated June 26, 1956, to which they and Peter were parties, and according to the trusts declared by that deed held the 28,510 preference shares and 44,190 ordinary shares as trustees or nominees for Peter.

The deed of release dated June 26, 1956, and made between Mrs. Oughtred of the first part, Peter of the second part, and the transferors of the third part; the transfer of 28,510 first preference shares and 44,190 ordinary shares of William Jackson & Son, Ltd.; and the trust deed dated June 26, 1956, were presented for adjudication with the transfer to Mrs. Oughtred and the duty on each of them was assessed at 10s.

In paragraph 12 of the case stated the commissioners stated that they were of the opinion that the oral agreement made on June 18, 1956, between Mrs. Oughtred and her son Peter was, for the purposes of the Stamp Act, 1891, and particularly of section 55 thereof, an agreement for sale by Peter to Mrs. Oughtred of his equitable reversionary interest in the property comprised in the settlement of January 1, 1924 (namely, the 100,000 ordinary and 100,000 preference shares), in consideration of the said 28,510 preference and 44,190 ordinary shares. The commissioners were further of opinion that, having regard to paragraph (*c*) of subsection (1) of section 53 of the Law of Property Act, 1925, the recital in the deed of release of June 26, 1956, that the trust fund consisting of the said 100,000 preference shares and 100,000 ordinary shares was " accordingly " now held by the trustees in trust for " Mrs. Oughtred absolutely was incorrect. Except for the transfer to Mrs. Oughtred no instrument in writing stamped with ad valorem duty transferring to her Peter's equitable reversionary interest was produced to the commissioners. The commissioners were of the opinion that the transfer to Mrs. Oughtred of the 100,000 preference shares and 100,000 ordinary shares was an instrument whereby the equitable interest of Peter in such shares was upon the sale thereof to her transferred to or vested in her and was accordingly a conveyance on sale of such equitable interest and liable to ad valorem duty on £33,140, being the agreed value at the date of the transfer to Mrs. Oughtred of the 28,510 preference shares and 44,190 ordinary shares. The commissioners were also of opinion that the transfer was a transfer not on sale to Mrs. Oughtred of the legal interest in the 100,000 preference shares and 100,000 ordinary shares.

The commissioners accordingly assessed the duty under the provisions of sections 1, 4 and 55 of the Stamp Act, 1891, and the heads of charge "Conveyance or Transfer on sale" and "Conveyance or Transfer of any kind not hereinbefore described" in the First Schedule to that Act and other relevant statutory provisions as follows:

Ad valorem transfer on sale duty on £33,140 ...	£663	0	0
and the fixed duty		10	0
Total duty on the transfer to Mrs. Oughtred ...	£663	10	0

No objection was made by Mrs. Oughtred to the assessment of 10s. duty on the transfer to her, but she contended that no ad valorem duty as a conveyance or transfer on sale was exigible on the transfer, and that it was liable to the duty of 10s. only under the head of charge "Conveyance or Transfer of any kind "not hereinbefore described" in the First Schedule to the Stamp Act, 1891, and being dissatisfied with the assessment made and, having paid the duty in accordance therewith, Mrs. Oughtred appealed against the assessment to the High Court.

The questions for the opinion of the court were: (i) whether the transfer to Mrs. Oughtred was liable to duty as assessed by the commissioners; (ii) if not, to what duty it was liable.

Upjohn J. held that the transfer was not a conveyance on sale within section 54 of the Stamp Act, 1891.

The Crown appealed.

R. O. Wilberforce Q.C. and *E. Blanchard Stamp* for the Crown.

Peter Whitworth for the taxpayer, Mrs. Oughtred.

The following cases were referred to in argument and are not mentioned in the judgments: *Garnett* v. *Inland Revenue Commissioners* [2]; *Cohen and Moore* v. *Inland Revenue Commissioners* [3]; *Fleetwood-Hesketh* v. *Inland Revenue Commissioners* [4]; *Inland Revenue Commissioners* v. *G. Angus & Co.* [5]; *Chesterfield Brewery Co.* v. *Inland Revenue Commissioners* [6]; *Ansell* v. *Inland Revenue Commissioners* [7]; *Brown, Shipley & Co.* v. *Inland Revenue Commissioners* [8]; *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners* [9]; *West London Syndicate* v. *Inland Revenue Commissioners.* [10]

Cur. adv. vult.

May 15. LORD EVERSHED M.R. read the judgment of the court: The question in this appeal is whether a transfer of shares

[2] (1899) 81 L.T. 633.
[3] [1933] 2 K.B. 126.
[4] [1936] 1 K.B. 351.
[5] (1889) 23 Q.B.D. 579; 5 T.L.R. 697.
[6] [1899] 2 Q.B. 7.
[7] [1929] 1 K.B. 608.
[8] [1895] 2 Q.B. 240; 11 T.L.R. 585.
[9] [1958] 2 W.L.R. 336; [1958] 2 All E.R. 406.
[10] [1898] 2 Q.B. 507.

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in ordinary form is chargeable with ad valorem stamp duty, as upon a sale, by reference to the consideration therefor; or only with the sum of 10s. The facts are as follows:

Immediately prior to the making of the oral agreement about to be related, Mrs. Phyllis Brown Oughtred, the respondent in this court, had the beneficial enjoyment during her own life of 100,000 £1 preference shares and 100,000 £1 ordinary shares of William Jackson & Son Ltd. standing in the names of the trustees (including herself) of a settlement dated January 1, 1924.

By virtue of an irrevocable appointment by Mrs. Oughtred in favour of her only son, Peter Bentham Oughtred (hereafter called "Peter"), pursuant to a power in that behalf contained in the settlement, the reversionary beneficial interest in the said shares, subject to Mrs. Oughtred's life interest, belonged absolutely to Peter.

On June 18, 1956, an oral agreement was made between Peter and his mother to the effect that (to quote the findings in the case stated) "Peter would on June 26" (following) "exchange his "interest under the settlement" for certain other shares in the same company belonging absolutely to Mrs. Oughtred "to "the intent that" (Mrs. Oughtred's) "life interest" (under the settlement) "should be enlarged into absolute ownership thereof."

On June 26, 1956, three deeds were executed, viz.: (1) a deed of release whereby, after reciting the various matters of fact above mentioned, Mrs. Oughtred and Peter gave to the trustees of the settlement of 1924 a complete release and discharge from all their obligations as such trustees; (2) the deed of transfer, the subject of this appeal, of the 200,000 shares in William Jackson & Son Ltd. from the trustees of the settlement to Mrs. Oughtred; and (3) a deed of transfer of the consideration shares in the same company from Mrs. Oughtred to nominees of her son.

We have mentioned the three deeds in the order which, if chronological, would be most favourable to Mrs. Oughtred. There was, however, no evidence or finding as to the order in which the deeds were in fact executed, and in our judgment they should be regarded as having been executed contemporaneously.

In *Grey* v. *Inland Revenue Commissioners*,[1] the problem, and the only problem, was one arising upon the terms of section 53 (1) (*c*) of the Law of Property Act, 1925, and it appeared at one time that a like problem arose in the present appeal also. It was and is the contention of the Crown that the oral contract of June 18, 1956, had been ineffective to transfer Peter's reversionary equitable interest in the shares to his mother. Upjohn J. had rejected this argument on the ground that, as a result of the contract, Peter had, in any case, become a constructive trustee of his interest for his mother, that subsection (2) of section 53 of the Law of Property Act, 1925, excepted constructive trusts from the operation of subsection (1), and (accordingly) that the result was the same for present purposes as though Peter had

[1] Ante, p. 45.

on June 18 effectively assigned his interest to his mother, leaving the legal estate in the shares outstanding in the trustees upon trust absolutely for Mrs. Oughtred. In this court the case for the Crown has, we think, been somewhat differently presented, and in the end of all, the question under section 53 of the Law of Property Act, 1925, does not, in our judgment, strictly call for a decision. We are not, however, with all respect to the judge, prepared to accept, as we understand it, his conclusion upon the effect of section 53 of the Law of Property Act, 1925.

In this court, Mr. Wilberforce has put the Crown's case alternatively. In the first place he has said that since immediately before the execution of the transfer on June 26, Peter's equitable reversionary interest remained in him, and since by the effect of the transfer Mrs. Oughtred acquired a full legal and beneficial title to the shares, therefore the transfer must have operated both to assign to Mrs. Oughtred Peter's reversionary interest and also the legal estate. On this view, which the Special Commissioners accepted, the transfer should be stamped, both ad valorem in respect of the former property, and with 10s. in respect of the legal estate. Alternatively, Mr. Wilberforce contended that the transfer, read in the light of the contemporary transfer of the other shares to Peter's nominees, and of the deed of release, was in truth nothing other than the completion and the contemplated method of completion of the oral contract, and so was a "convey-" ance or transfer on sale of property" within the meaning of section 54 of, and the First Schedule to, the Stamp Act, 1891.

Apart from the point above mentioned (under section 53 of the Law of Property Act, 1925), the Crown's former alternative is, in our judgment, faced with the formidable objection that, if the transfer operated as an assignment of Peter's interest as a distinct item of property (as must follow from the Crown's claim to the additional 10s. duty), then how was it achieved in the absence of Peter as a conveying party? We have found difficulty in appreciating the answer to this objection, but it is, in the event, unnecessary for us to express a view upon it, for we have come to the conclusion that the Crown is entitled to succeed upon Mr. Wilberforce's second alternative, though the result is to diminish the amount of duty leviable by the item of 10s.

It is undoubtedly true that stamp duty is leviable upon instruments and not upon transactions. But it is equally clear that the court is not thereby debarred from inquiring what is the true nature and intended purpose of the instrument sought to be charged. In the present case the transfer in suit, together with the transfer to Peter's nominees by his mother of the consideration shares, were contemporaneous with the deed of release. The terms of the last-mentioned deed are, in our judgment, of vital significance. It recites that on the previous June 18 Peter and his mother had agreed that they would on June 26 exchange his reversionary interest for her shares "to the intent that" Mrs.

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Oughtred's life interest "should be enlarged into absolute owner-"ship thereof." It is true that the recital continues (somewhat ungrammatically) "The trust fund . . . is now held by the "trustees in trust for Mrs. Oughtred absolutely . . . and it is "intended that the same shall forthwith be transferred to Mrs. "Oughtred." But the operative part is: "Now in consideration "of the premises *and of the transfer to be made as aforesaid*" followed by a release and discharge to the trustees. In our judgment, in the light of the language which we have quoted, and of the fact that the oral contract was one for an exchange to be effected on June 26, the proper conclusion is that the transfer constituted (as it was intended and contemplated that it should) the completion of the oral bargain made eight days before; and so constitutes the conveyance upon, that is to say, consequent upon and in implementation of, the contract for sale of June 18.

The material part of the judge's judgment was [2]: "You must "look at the facts of each case. Plainly it is not essential that "the vendor should be a party. For example, where shares are "in the names of nominees the transfer from such nominees is "plainly a conveyance on sale, and, despite Mr. Whitworth's "submission to the contrary, in such a case it is not necessary to "mention expressly the equitable interest in the deed of transfer. "In this case, however, the appellant could not call on the "trustees to convey the shares to her merely upon proof of "the oral agreement. They were entitled to say, and in this case "presumably did say: 'Here is a subsisting trust, and we will "'not part with the trust assets except with the assent of every-"'one who is interested in them upon having a release in the "'usual way not only from you but from Peter. We are not "'concerned with dealings between beneficiaries.'

"Although the transfer was executed as a direct result of the "agreement for sale and really upon the occasion thereof, still it "remains in my judgment incorrect in the particular circum-"stances of this case to describe it as a conveyance on sale. The "transfer was, in my judgment, a transfer not on sale but on "the winding up of the trust and upon the release of the "trustees. This point also fails." With the earlier part of this passage we respectfully agree. But we differ from the judge in his conclusion. We do not think, with all respect to him, that, in light of the circumstances we have mentioned, the transfer can properly be regarded as one consequent upon a winding up of the trusts; or, even if it was so in some sense, that it was not therefore in substance and reality a completion of the contract.

As the judge observed, it is not essential that a vendor should be a party to the instrument which constitutes the completion of his contract for sale. An obvious example, given by the judge, is a transfer of shares by the vendor's nominees. The case of *Attorney-General* v. *Brown* [3] is also authority for such a view. Though the precise point was a different one, the substance of

[2] [1958] Ch. 383.

[3] (1849) 3 Exch. 662.

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the matter in that case was that the grant of a lease by the freeholder to B constituted the completion of A's agreement to sell to B for valuable consideration his own contractual right to a lease from the freeholder. If, immediately after the transfer Mrs. Oughtred had the whole legal and beneficial interest in her shares, and if, immediately prior to the transfer (and the other contemporary documents) she had not got (as, in my view, she had not) the entire beneficial interest, then, in our judgment, it must follow that the former state of affairs was achieved, as it was intended that it should be, by the instrument of transfer, which thereby completed and implemented the bargain that mother and son had previously made.

The distinction between the two alternative presentations of the Crown's case may be a fine one, but it is real. It is of the essence of the former alternative that the transfer operated to convey two separate and distinct "properties," viz., the legal estate and Peter's reversionary equitable interest, the Crown claiming duty in respect of each "conveyance." Though the vendor under the contract need not be a conveying party, the latter must, as we conceive, be in a position to convey the property alleged to pass. The second alternative treats the three documents of June 26 (being the date fixed by the contract for completion) as contemporaneous, and deduces—particularly from the terms of the release—that the trustees were thus enabled and entitled to transfer to Mrs. Oughtred (as the transfer on the face of it purports to do) the shares themselves with all rights and benefits attached thereto.

For these reasons we think that the appeal should be allowed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor, Board of Inland Revenue; Moeran, Oughtred & Co.*

B. A. B.

[NEWCASTLE-UPON-TYNE ASSIZES.]

GREEN *v.* FIBREGLASS LTD.

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May 14, 15, 23.
Salmon J.

[1957 G. No. 439.]

Licensor and Licensee—Independant contractor—Negligence of—Office cleaner—Defective electrical installation—Installed by expert contractors—Issue of liability of occupier of offices—Invitee.

Licensor and Licensee—Invitee or licensee—Duty of occupier—Liability solely in negligence.

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

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The defendants were the tenants and occupiers of certain offices. By agreement with the defendants the plaintiff undertook the cleaning of the offices by herself or her employees. The manner and time in which the work was to be done were entirely within the plaintiff's own discretion and when on the premises she was not the servant of the defendants but was their invitee. On July 31, 1956, when cleaning an electric fire in the offices, the plaintiff sustained severe electrical burns caused by faulty wiring of the wires leading from the mains to the switch and socket into which the electric fire was plugged. When the defendants became tenants of the offices in 1951 they had taken the precaution of having them completely rewired by reputable expert electrical contractors, and it was due to the negligence of one of the contractors' workmen that the switch was dangerously wired. The defendants had no reason to suppose that the contractors had been negligent or that the installation was unsafe:—

Held, that the defendants had discharged their duty to the plaintiff as invitors by employing competent electrical contractors; if some act was to be performed which called for special knowledge and experience which an invitor could not be expected to possess, he fulfilled his duty of care by employing a qualified and reputable expert to do the act.

Haseldine v. *C. A. Daw & Son Ltd.* [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156 applied.

Dalton v. *Angus* (1881) 6 App.Cas. 740; *Hughes* v. *Percival* (1883) 8 App.Cas. 443; *Wilsons & Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628; and *Thomson* v. *Cremin* [1956] 1 W.L.R. 103, 110; [1953] 2 All E.R. 1185 distinguished.

Per Salmon J. (considering dictum of Lord Wright in *Thomson* v. *Cremin*). I doubt whether it is helpful to import into this branch of the law the conception of warranty. That seems to me to belong exclusively to the law of contract. The obligation of an invitor to an invitee has nothing to do with the law of contract or quasi-contract. . . . The invitee's cause of action lies in negligence and nothing else.

Action.

The plaintiff, Annie Thomas Green, claimed damages for injuries caused by the alleged negligence of the defendants, their servants or agents. The following statement of facts is summarized from the judgment:

The defendants were the tenants and occupiers of certain offices at 16, Dean Street, Newcastle-upon-Tyne, a fairly large building containing a number of other offices let to other tenants. The plaintiff was employed by the landlords as caretaker of the whole of 16, Dean Street, and by agreement with various tenants arranged for the cleaning of the various offices and employed for that purpose a number of charwomen. By agreement with the defendants, their offices were regularly cleaned by one or more of the charwomen employed by her, and occasionally, when one of the charwomen was ill or on holiday, the plaintiff would clean or help to clean these offices herself. Salmon J. held that the evidence did not establish that the plaintiff was a servant of the defendants. She was not subject to the control or direction of the defendants, and the manner and time in which the work was to be done were entirely within the plaintiff's own discretion.

On July 31, 1956, owing to the absence of one of the charwomen, the plaintiff was herself helping to clean the defendants' offices. While she was attempting to clean an electric fire with a duster she received severe electrical burns, as a result of which the fingers of her right hand had to be amputated. She was left with only the thumb and a small stump of one finger on that hand. At the time of the accident, the electric fire was plugged into a wall socket which was controlled by the normal type of switch. The switch was in the "Off" position and the fire was cold. Nevertheless, the element was alive. There was no fault in the electric fire itself. The wiring from the main switch to the socket was faulty. There were three wires concerned: the earth wire, the line or live wire, and the neutral wire. According to good electrical practice, these wires should each be of a different colour so as to avoid confusion; in fact, they were all coloured red. The line wire should go through, and be controlled by, the switch. At the time of the accident, owing to negligence on the part of the electrical contractor concerned, the neutral wire and not the line wire was connected with the switch, so that if the switch was on, the element in the electric fire glowed and gave out heat in the usual way, but, when the switch was off, the element faded and ceased to give out heat but continued to be charged with electricity.

When the defendants became tenants of the offices in 1951, they had them completely rewired by Cairns (Newcastle) Ltd., electrical contractors. Salmon J. held that it was due to the negligence of one of that company's workmen that the switch was, in the first place, negligently and dangerously wired.

P. Stanley Price Q.C. and *Lyall Wilkes* for the plaintiff.
G. S. Waller Q.C. and *J. R. Johnson* for the defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

May 23. SALMON J. stated the facts and continued: The question arises whether the defendants are responsible for the negligent wiring which caused this accident. I have held that the plaintiff was not a servant of the defendants; at the time of the accident she was the defendants' invitee. It is clearly settled that the defendants, as invitors, owe a duty to exercise due care for the safety of their invitee, the plaintiff. An invitor must use reasonable care to prevent damage from an unusual danger of which he knows or ought to know: *Indermaur* v. *Dames*.[1] What is reasonable care must depend upon the circumstances of each particular case. When the defendants took over these offices in 1951 they knew nothing about the wiring; the wiring, for all they knew, might then have been dangerously defective. They took

[1] (1866) L.R. 1 C.P. 274.

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the precaution, however, of having the offices completely rewired by Cairns (Newcastle) Ltd. I find that this company was, and the defendants reasonably believed them to be, a long-established firm with a high reputation as electrical contractors. It is true that the information before me on this point is not very detailed, but it appears from the documents that have been put in evidence that that company has been in business in Newcastle since 1905, and that its directors are well-qualified electrical engineers. No evidence was called by the plaintiff, nor were any questions put in cross-examination, to suggest that Cairns (Newcastle) Ltd. are other than competent experts, or that the defendants had any reason to doubt that fact. It is obvious that unless the electrical wiring of any premises is put into a safe condition, anyone using the premises may be exposed to danger of an unusual kind. Electrical wiring, however, is a matter for expert electrical contractors and is not ordinarily carried out by the occupier himself. How were the defendants to fulfil their duty to use reasonable care? I cannot think it was incumbent on them to send one of their directors or servants to a Polytechnic to take a course in electrical engineering and then attempt the rewiring themselves. In my view, they would discharge their duty of care by employing reputable and competent experts; and this they did. Nor had the defendants at any time thereafter any reason to suppose that the experts had been negligent, or that the electrical installation was unsafe.

This case seems to me to be indistinguishable from *Haseldine* v. *Daw & Son Ltd.*,[2] in which it was held that the owners of lifts discharge their duty of care to invitees by employing competent experts to attend to the lift for them. In that case, the lift in question became dangerous by reason of the negligence of one of the expert's servants and the plaintiff thereby suffered damage. It was held by the Court of Appeal that the defendants were not liable for the negligence of the servants of their independent contractor experts. Scott L.J. held that the plaintiff was an invitee; Goddard and Clauson L.JJ. did not decide whether he was a licensee or an invitee, but said that even if he were an invitee, his claim must still fail against the occupier. Mr. Stanley-Price, on behalf of the plaintiff, has sought to distinguish that decision on the ground that in the present case the defendants did not employ experts to make regular inspections of the electrical installation. I am not impressed by that point. An ordinarily prudent man, it is true, would have his lift regularly examined and serviced by an expert. I cannot believe, however, that an ordinarily prudent man who had had his premises wholly rewired by experts would think of having the wiring examined within five years of its installation unless there was any special reason, such as an apparent fault, for him to do so. Here, there was no such reason. *Haseldine* v. *Daw & Son Ltd.*[3] was

[2] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[3] [1941] 2 K.B. 343.

distinguished, but no doubt was cast upon it, by du Parcq L.J. in *Woodward* v. *Mayor of Hastings*,[4] and by Parker J. in *Bloomstein* v. *Railway Executive*.[5] Those were cases—as were *Pickard* v. *Smith*[6] and *Wilkinson* v. *Rea Ltd.*[7]—where the safety of the invitee depended upon the careful performance of some act which called for no technical knowledge or experience but upon acts which the courts held that the invitor could and should have done himself and which he neglected to do. In such cases, the invitor is liable for his neglect to do the act. It is no excuse for his failure to do that act that, for purposes of his own, he chooses to employ an independent contractor who has neglected to perform the act or to perform it carefully. du Parcq L.J. and Parker J. reaffirmed that in the *Haseldine* v. *Daw* class of case—to which the present case, in my judgment, clearly belongs—the invitor, because of his inherent lack of technical knowledge or experience, discharges his duty of care to the invitee, not by attempting to do the act himself but by employing a properly-qualified independent contractor to do it for him. In another context, *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.*[8] and *Stennett* v. *Hancock & Peters*[9] are illustrations of the same principle.

It is well settled that generally in an action for negligence a man is not vicariously liable for the carelessness of an independent contractor. There are, of course, cases where, by virtue of a contract or by the operation of law, an obligation may be imposed on a man to do an act, or to ensure that it is done and done carefully. In such cases, the defendant cannot shelter behind any independent contractor whom he may have employed. If he breaches the obligation he is liable, not in negligence but in contract, as in *Maclenan* v. *Segar*,[10] or by reason of some breach of duty other than a duty to take care, as in *Dalton* v. *Angus*.[11] The master, too, owes special duties to his servant which he cannot delegate. Those duties, however, spring from the nature of the contract of service. I can find no authority for holding that an invitor owes the same duty to his invitee as a master does to his servant. "Ever since *Quarman* v. *Burnett*[12] it has been "considered settled law that one employing another is not liable "for his collateral negligence unless the relation of master and "servant existed between them. So that a person employing "a contractor to do work is not liable for the negligence of that "contractor or his servants. On the other hand, a person causing "something to be done, the doing of which casts on him a "duty, cannot escape from the responsibility attaching on him of "seeing that duty performed by delegating it to a contractor":

[4] [1945] 1 K.B. 174, 182; 61 T.L.R. 94, 95; [1944] 2 All E.R. 565, 567.

[5] [1952] 2 All E.R. 418.

[6] (1861) 10 C.B.N.S. 470.

[7] [1941] 1 K.B. 688; [1941] 2 All E.R. 50.

[8] [1923] 1 K.B. 539; [1923] 2 K.B. 832; 39 T.L.R. 207.

[9] [1939] 2 All E.R. 578.

[10] [1917] 2 K.B. 325; 33 T.L.R. 351.

[11] (1881) 6 App.Cas. 740.

[12] (1840) 6 M. & W. 499.

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Dalton v. *Angus, per* Lord Blackburn.[13] It is important to observe that the duty cast upon the defendant in that case was not a duty to take care but a duty not to let down the plaintiff's adjoining buildings whilst excavating on his own land, the plaintiff having acquired a right of support by 20 years' enjoyment of such support.

Hughes v. *Percival*,[14] *Honeywill & Stein Ltd.* v. *Larkin Bros. Ltd.*[15] and *Black* v. *Christchurch Finance Co. Ltd.*[16] are exceptional cases because there the defendants were employing contractors to do extra-hazardous acts, that is, acts which in their very nature involve in the eyes of the law special danger to others. It may be that such cases, like the master and servant cases, are an exception to the general rule that persons employing a contractor are not vicariously liable for his negligence or for the negligence of his servants.

On October 20, 1941, the House of Lords decided *Thomson* v. *Cremin*.[17] The judgment in *Haseldine* v. *Daw & Son Ltd.*[18] was delivered on July 31, 1941, that is, nearly three months before the decision in *Thomson* v. *Cremin*. It is argued by counsel for the plaintiff that I ought not to follow *Haseldine* v. *Daw* because that case is inconsistent with the decision in *Thomson* v. *Cremin*. I do not agree, although it must be conceded that some of the dicta of Lord Wright in *Thomson* v. *Cremin* are not easy to reconcile with *Haseldine* v. *Daw*. In my judgment, however, *Haseldine* v. *Daw* is not affected by *Thomson* v. *Cremin* and is binding on me. Moreover, in my humble view, it is consonant alike with principle, common sense, and, as I have attempted to show, the whole stream of authority. It is to be observed that the point decided in *Haseldine* v. *Daw* was not even argued in *Thomson* v. *Cremin*, nor did it arise. The appellant shipowner in *Thomson* v. *Cremin* had chosen to employ independent contractors to fit and secure a shore in his ship. As a result of the independent contractor's negligence, the first respondent (who was a stevedore's labourer) was injured. The work in question in that case does not seem to me to have called for any special technical knowledge or experience which the ordinary shipowner does not possess. The case, therefore, seems to me to fall within the class of cases illustrated by *Woodward* v. *Mayor of Hastings*[19] and *Bloomstein* v. *Railway Executive*[20] rather than by *Haseldine* v. *Daw*.

The facts which might have been relevant to the point I am now considering are not fully set out in *Thomson* v. *Cremin* as they would have been had the point there been under consideration. It appears, however, from the speech of Lord Porter[21] that the appellant may well have been in control of the ship's hold

[13] 6 App.Cas. 740, 829.
[14] (1883) 8 App.Cas. 443.
[15] [1934] 1 K.B. 191; 50 T.L.R. 56.
[16] [1894] A.C. 48.
[17] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.
[18] [1941] 2 K.B. 343.
[19] [1945] 1 K.B. 174.
[20] [1952] 2 All E.R. 418.
[21] [1953] 2 All E.R. 1185, 1196.

and directing operations at the time of the erection of the shore. Viscount Simon (with whose speech Lord Romer concurred) and Lord Porter pointed out that the case turned almost entirely on questions of fact. I cannot think that they intended in effect to alter what I conceive to be the whole current of authority on a point of law which was never argued before them.

Counsel for the plaintiff has relied strongly on the observations of Lord Wright in that case, particularly the following passage [22]: "It is true that the invitor is not an insurer: he warrants, how-"ever, that due care and skill to make the premises reasonably "safe for the invitee have been exercised, whether by himself, "his servants, or agents or by independent contractors whom "he employs to perform his duty. He does not fulfil the "warranty merely by leaving the work to contractors, however "reputable or generally competent. His warranty is broken if "they fail to exercise the proper care and skill. This is only "an instance of the general rule which was stated by Lord Black-"burn in another connexion in *Dalton* v. *Angus* [23] . . . Lord "Blackburn again enunciated the same principle in *Hughes* v. "*Percival*.[24] More recently this House again in a different con-"text of fact, applied this rule in *Wilsons & Clyde Coal Co. Ltd.* "v. *English*." [25] These observations, although obiter, necessarily carry the greatest weight. Nevertheless, as I have ventured to observe, *Dalton* v. *Angus* [26] was not a case where the claim was in negligence, and *Hughes* v. *Percival* [27] falls into a very special category to which the present case and *Haseldine* v. *Daw & Son Ltd.*[28] do not belong; *Wilsons & Clyde Coal Co. Ltd.* v. *English* [29] was a case of master and servant. With great diffidence, I doubt whether it is helpful to import into this branch of the law the conception of warranty. That seems to me to belong exclusively to the law of contract. The obligation of an invitor to an invitee has nothing to do with the law of contract or quasi-contract, but is part of the law of tort. The invitee's cause of action lies in negligence and nothing else. The only obligation of the invitor in essence is an obligation imposed by law to take reasonable care and nothing more. In each case the question must be posed: How ought that obligation to be performed? The answer to that question must depend on the particular facts of each case. If, as in the present case and in *Haseldine* v. *Daw & Son Ltd.*,[30] some act is to be performed which calls for special knowledge and experience which the invitor cannot be expected to possess, then, in my judgment, he fulfils his duty of care as a prudent man by employing a qualified and reputable expert to do the act.

In my judgment, it follows that the claim fails against the present defendants. I would add that on the facts as I have

[22] [1956] 1 W.L.R. 103, 110.
[23] 6 App.Cas. 740, 829.
[24] (1883) 8 App.Cas. 443, 446.
[25] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.
[26] 6 App.Cas. 740.
[27] 8 App.Cas. 443.
[28] [1941] 2 K.B. 343.
[29] [1938] A.C. 57.
[30] [1941] 2 K.B. 343.

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found them it would appear that there could have been no answer to the claim had it been brought against Cairns (Newcastle) Ltd.

Judgment for the defendants.

Solicitors: *Gibson, Pybus & Reay-Smith, Newcastle-upon-Tyne; R. H. Eggar, St. Helens.*

[CHANCERY DIVISION.]

1958
May 20.

Vaisey, J.

In re ALLSOPP'S MARRIAGE SETTLEMENT TRUSTS. PUBLIC TRUSTEE *v.* CHERRY AND OTHERS.

[1958 A. 546.]

Husband and Wife—Property—Settlement—Variation—Determinable life interest for husband—Discretionary trust in favour of issue of marriage after determination of husband's life interest—Order of Divorce Division extinguishing all interests of husband under marriage settlement as if he "had died in the lifetime of the "petitioner"—Whether discretionary trust extinguished by order. Trust and Trustee—Protective trust.

By a marriage settlement dated September 6, 1916, a fund was settled on trust to pay the income thereof to the wife during the joint lives of the husband and the wife, and if she survived him to pay the whole of the income to her for the rest of her life, and if he survived her to pay the income to the husband for life, subject to determination in certain events. The settlement further provided that in the case of determination of the husband's life interest during his lifetime there was to be a discretionary trust in favour of the husband and "issue of the intended marriage." The parties were married on September 20, 1916, and there was one child of the marriage, a son, the second defendant. The marriage was dissolved on August 8, 1928, and by an order of the Divorce Division dated July 1, 1929, it was provided that the settlement of September 6, 1916, "be varied by extinguishing all the rights powers and "interests of the [husband] in and under the said settlement as if "he were already dead and had died in the lifetime of the [wife]."

On a summons to determine whether the order operated as a failure of the husband's life interest in the event of his surviving the wife, so that the discretionary trust would take effect, or as a failure of the trust in his favour by reason of his death during the wife's lifetime so that the discretionary trust could not take effect:—

Held, that the discretionary trust in favour of the husband and "issue of the intended marriage" was engrafted on the husband's determinable life interest and could have no separate existence; so that when that life interest was extinguished by the order of July 1, 1928, the trust engrafted on it was also extinguished.

ADJOURNED SUMMONS.

By a marriage settlement dated September 6, 1916, made in contemplation of a marriage between Winifred Violet Allsopp and Reginald Arthur Walter, certain property of the intended

wife was settled on trust to pay the income thereof to the wife during the joint lives of the husband and wife, subject to the annual payment of £300 to the husband, and if the wife should survive the husband on trust to pay the whole of the income to the wife for the residue of her life. By clause 2 (iv), if the husband should survive the wife the income was to be held on trust for him during his life, but if he should do or attempt to do or should suffer any act or thing or if any event should happen whereby if the said annual income were payable to him absolutely for his life he would be deprived of the right to receive the same or any part thereof then in any such cases as well as on his death the trust therein declared for payment to him of the annual income should determine. By clause 2 (v) if the husband's life interest should " fail or determine in his lifetime then during the " residue of his life " there was a discretionary trust " to apply " the annual income of the trust fund for the maintenance and " support or otherwise for the benefit of all or any one or more " exclusively of the others or other of the . . . husband and the " issue of the now intended marriage " as the trustees should think fit. By clause 3 the wife was given a limited power if she should marry again to revoke the trusts thereinbefore declared and to appoint the fund on such trusts for the benefit of any husband who might survive her and any child or children or other issue of such subsequent marriage.

The husband and wife were married on September 20, 1916, and there was issue of the marriage one child only, the second defendant, Michael Anthony Victor Walter who, at the date of the summons was without issue. The marriage was dissolved on August 8, 1928. By an order of the Divorce Division dated July 1, 1929, it was ordered that the said marriage settlement " be varied by extinguishing all the rights, powers and " interests of the [husband] in and under the said settlement as " if he were already dead and had died in the lifetime of the [wife] " and that the [wife's] power of appointment under clause 3 of " the settlement in favour of any husband who may survive her " and of any issue of a subsequent marriage be only exercisable " in the lifetime of the [husband] to the extent of three eighth " parts of the settled funds." The wife, the first defendant, married again on January 6, 1930, and there was issue of the marriage one child only, the third defendant, Vivian Ann Dowell.

The trustee of the marriage settlement of September 6, 1916, now asked the court to determine whether, on the true construction of the settlement and the order of July 1, 1929, varying the settlement, the extinguishment by the latter of all the rights, powers and interests of the husband in and under the settlement operated as a failure or determination in the lifetime of the husband of the trust to pay the income of the fund to him in the event of his surviving the wife so that the discretionary trust would take effect, or was to be regarded as a failure or determination of the trust for the benefit of the husband by reason of his

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death in the lifetime of the wife so that the discretionary trust could not take effect.

J. A. Armstrong for the plaintiff trustee.
H. E. Francis for the defendants.

The cases cited in argument are referred to in the judgment.

VAISEY J. stated the facts and continued: There is a general principle that one document does not vary another unless the intention to vary is reasonably plain, and it should be noted that the order does not say that the settlement is thenceforth to take effect as if the former husband were dead and had died in the lifetime of the former wife. The question is: What does it mean in the circumstances? The order is peculiar in this way, that, having first of all said that the husband's rights were all extinguished as if he were dead, it goes on to presuppose that the husband will continue to be living, because of the limit on the wife's right to withdraw property and to make a subsequent settlement.

There is no doubt that the husband's rights, powers and interests were extinguished by this order and I have come to the conclusion that if you extinguish the former husband's protected life interest, you extinguish it for all purposes; that the subsequent trusts in favour of the issue of the marriage are, so to speak, engrafted on to his life estate, and that when the parent tree (that is to say, the life estate itself) disappears, those engrafted trusts necessarily cease to exist or are finally precluded from coming into existence. Mr. Armstrong, appearing for the public trustee as the present sole trustee of the settlement, has argued that by extinguishing the rights of the former husband you do not extinguish any other rights and in particular you do not extinguish the rights of possible unborn issue of the marriage who might be regarded as still having their rights intact. That is a view which is possible on the literal reading of these words; but, on the whole, for the reason I have given, I do not think that that argument should prevail.

There is a certain amount of authority in these matters and I have been referred to two cases. *Webb* v. *Webb* [1] seems to show that a remainder in this kind of case can be disregarded, and *Bowles* v. *Bowles*,[2] which is not very helpful because I have nothing to rely on except the argument of Mr. Hodson (now Hodson L.J.), with which the judge seems to have been perfectly content, though he does not say so. But, looking at the matter from the common-sense point of view, it seems to me that it would be a rather capricious conclusion to reach, that, although the husband's contingent life estate in remainder has been completely extinguished, yet the ancillary trusts and powers which

[1] [1929] P. 159.

[2] [1937] P. 127; [1937] 2 All E.R. 263.

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Vaisey, J.

grow out of that life estate in the case of forfeiture and other incidents survive. On the whole, I think that the destruction of the life interest did destroy the interests of the unborn issue and I will so decide.

There is no doubt that an order of the divorce court can operate so as to create a forfeiture; that is borne out by *In re Carew's Trusts* [3] before Eve J. and, although I agree that an order can so operate, I am not sure that that is relevant here. The life estate has been extinguished, and the substituted discretionary trusts in my judgment are so closely connected with, and so definitely grafted upon, the life estate which the divorce court has expressly destroyed that they can have no separate existence of their own. I think the proper declaration for me to make is that the effect of the settlement and of the order of the divorce court varying that settlement is completely to destroy and determine (or, rather, cause completely to fail) the husband's reversionary life estate and, together with that reversionary life estate, the contingent discretionary trusts which, upon the failure or determination of that life estate, were declared for the benefit of himself and the issue of the marriage. Those discretionary trusts seem to me to be wiped out as completely by the destruction of the life estate upon which they depended as if they had been expressly mentioned in the order of the divorce court.

Declaration accordingly.

Solicitors: *Gillhams for George T. Richards & Morgan, Bournemouth.*

P. P.

[3] (1911) 103 L.T. 658.

[QUEEN'S BENCH DIVISION.]

ATTORNEY-GENERAL *v.* SMITH AND OTHERS.

1958
June 5.

Lord Goddard C.J.

[1957 H. No. 599.]

Town and Country Planning—Enforcement notice—Non-compliance—Development without permission—Whether lawful—Relator action—Injunction—Caravan site—Retrospective application for permission refused—Appeal to Minister—Removal of caravans to another site after dismissal of appeal—Repeated applications for permission and appeals in respect of other sites—Whether development without permission unlawful—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 12 (1), 18, 23.

Injunction—Relator action—Act conferring public benefit—Course of conduct showing intention to use machinery of Act to evade its provisions—Jurisdiction of court to grant injunction—Town and Country Planning Act, 1947, *ss.* 12 (1), 18, 23.

On March 28, 1955, the first defendant, without obtaining planning permission, began to use land of which he was the owner as a

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site for caravans. On April 23, after an enforcement notice, pursuant to section 23 of the Town and Country Planning Act, 1947,[1] had been served on him, he applied for planning permission to develop the land as a caravan site, and the operation of the enforcement notice was thereby suspended.[1] Permission was refused and the defendant appealed to the Minister. On December 31, the Minister dismissed the appeal. By that time it had been made clear to the defendant that planning permission had not been refused by reason of any objection to the site, but because it was the policy of the local planning authority not to allow caravan sites in their district, as it was part of the Green Belt, but on June 20, 1956, another application for planning permission was made, which was refused. The caravans remained on the site and on September 5 the defendant pleaded guilty to an offence under section 23 (4) of the Act and was fined £25. On October 7, after a summons applying for a daily penalty had been served, the caravans were removed to a second site in a next-door field, and on October 10 the defendant was again convicted and fined £2. On November 6 the defendant applied for planning permission in respect of the second site, which application was refused. On January 26 the second defendants (a company of which the defendant was one of two directors) applied for planning permission to develop a third site, on a nearby farm belonging to the third defendant, as a site for caravans, and about the same time some

[1] Town and Country Planning Act, 1947, s. 12 (1): "Subject to "the provisions of this section and "to the following provisions of this "Act, permission shall be required "under this Part of this Act in "respect of any development of land "which is carried out after the "appointed day."

S. 18: "(1) The power to grant "permission to develop land under "this Part of this Act shall include "power to grant permission for the "retention on land of any buildings "or works constructed or carried out "thereon before the date of the appli-"cation, or for the continuance of "any use of land instituted before "that date (whether without permis-"sion granted under this Part of this "Act or in accordance with permis-"sion so granted for a limited "period); and references in this Part "of this Act to permission to develop "land or to carry out any develop-"ment of land, and to applications "for such permission, shall be con-"strued accordingly. (2) Any such "permission as is mentioned in the "foregoing subsection may be "granted so as to take effect from "the date on which . . . the use was "instituted."

S. 23: "(1) If it appears to the "local planning authority that any "development of land has been carried "out after the appointed day without "the grant of permission . . . the "local planning authority may . . . "if they consider it expedient so to "do having regard to the provisions "of the development plan and to any "other material considerations, serve "on the owner and occupier of the "land a notice under this section. "(3) . . . an enforcement notice shall "take effect at the expiration of "such period (not being less than "twenty-eight days after the service "thereof) as may be specified there-"in: Provided that (*a*) if within the "period aforesaid an application is "made to the local planning autho-"rity . . . for permission . . . for "the continuance of any use of the "land, to which the enforcement "notice relates, the notice shall be of "no effect pending the final deter-"mination of that application, and "if such permission . . . is granted "on that application, the notice shall "not take effect."

S. 24 (3): "Where, by virtue of "an enforcement notice, any use of "land is required to be discontinued ". . . then if any person, without "the grant of permission . . . uses "the land or causes or permits the "land to be used . . . in contraven-"tion of the notice, he shall be guilty "of an offence and liable on summary "conviction to a fine not exceeding "fifty pounds; and if the use is "continued after the conviction, he "shall be guilty of a further offence "and liable on summary conviction "to a fine not exceeding twenty "pounds for every day on which the "use is so continued."

of the caravans moved on to that site. The application was refused and the company appealed to the Minister. On March 11, 1957, the Attorney-General, on the relation of the local urban district council, the planning authority, issued a writ for an injunction restraining the defendants from using or causing or permitting to be used as a caravan site any land within the boundaries of the council without the prior grant of planning permission under the Act.

By about March 25, 1957, all the caravans had moved to the third site. On July 6 the Minister dismissed the appeal in respect of that site and subsequently two further applications for planning permission relating to nearby sites on the same farm were made. Both applications were refused and appeals brought against the refusals were dismissed by the Minister on April 24, 1958. Enforcement notices in respect of the use of the third site had been served on October 23, 1957, but at the date of the hearing of the action the caravans were still there. The relator council alleged that, by moving from one unauthorized site to another in the district the defendants were flouting the enforcement provisions of the Act and bringing the law into disrepute. The defendants contended that development without permission was not in itself unlawful, and that, since no offence was committed under the Act until an effective enforcement notice had been contravened, they were not acting in breach of the Act in taking advantage of the procedure laid down by it:—

Held, that under section 12 (1) of the Act any development of land carried out without planning permission was unlawful and contrary to the Act, and that, therefore, since the defendants' course of conduct in using the machinery of the Act, not for making genuine applications for planning permission, but for the purpose of delay, showed an intention to act in defiance of and to evade the provisions of the Act so far as and for as long as they could, and as the Act was one which was designed for the public benefit, the Attorney-General was entitled to the injunction sought.

Attorney-General v. *Wimbledon House Estate Co.* [1904] 2 Ch. 34; 20 T.L.R. 489; and *Attorney-General* v. *Bastow* [1957] 1 Q.B. 514; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497 applied.

ACTION.

On March 28, 1955, the first defendant, Joseph Sidney Claude Smith, began to use land belonging to him at Retreat Farm, Egham, as a caravan site by allowing five caravans to come on to the land. No planning permission had been sought or obtained and on April 12, 1955, the Egham Urban District Council, acting for the local planning authority under the Town and Country Planning Act, 1947, served on him an enforcement notice pursuant to section 23 of the Act requiring the discontinuance of the use of the land as a caravan site on or before May 16, 1955. On April 14 the defendant applied to the council for planning permission to develop the land as a caravan site, thereby suspending the operation of the enforcement notice.[1] On May 25 the application was refused and on July 18 the defendant appealed against that refusal to the Minister of Housing and Local Government. On September 20, by which time there were 60 caravans on the site, a public local inquiry was held and on December 31 the Minister gave his decision dismissing the appeal, but expressing the hope that the council

[1] For footnote 1 see p. 82.

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would time any action necessary for the enforcement of the decision so as not to cause undue hardship to persons resident in the caravans and to give them reasonable opportunity to make arrangements to move. By that time it had been made clear to the defendant that planning permission had been refused, not because of any particular objection to the site, but because the district was in the Green Belt. On May 3, 1956, the caravans were still on the site and the council served a further enforcement notice taking effect on June 30, 1956. The defendant took no steps to comply with the enforcement notice but on June 20 made another application for planning permission for a temporary period of three years, submitting a new scheme and lay-out for the same site. On August 9 that application was refused and on August 14 the council issued a summons against the defendant for non-compliance with the enforcement notice. The summons was heard on September 5, when the defendant pleaded guilty and was fined £25 and ordered to pay £5 5s. costs. No steps were taken to comply with the enforcement notice and on September 26 the council issued a further summons applying for the daily penalty. That summons was returnable on October 10, 1956; but on October 7 the caravans were moved to another site, Maindy, in an adjoining field, and at the hearing of the summons the defendant pleaded guilty and was fined £2 with £3 3s. costs.

On November 6, 1956, the defendant applied for planning permission in respect of the Maindy site, which application was refused on January 15, 1957. On January 25 a direction made by the council (and duly approved by the Minister) under article 4 of the Town and Country Planning General Development Order, 1950, excluding from the general permission contained in article 3 of the order the use of any vacant land in the urban district of Egham as a caravan site for a temporary period of 28 days without the grant of planning permission was advertised and came into force. Meanwhile, on November 29, 1956, the second defendants, Modern Trailer Homes Ltd., of which the first defendant was one of the two directors, was formed. On January 26, 1957, an application was submitted on behalf of the defendant company to develop nearby land, part of Royal Hythe Farm, the property of the third defendant, Beatrice Pearlberg, as a site for caravans. On about the same date some of the caravans started to move on to the Royal Hythe Farm site and the council erected warning notices outside the entrance that it had not been approved as a site for caravans. On February 6, 1957, the application for planning permission in respect of the Royal Hythe Farm site was refused. On February 9 an appeal was made against the refusal of planning permission in respect of the Maindy site and on February 13 the council served an enforcement notice.

On March 11, 1957, the Attorney-General issued a writ at and by the relation of the council claiming an injunction restraining all three defendants and each of them by themselves, their servants or agents or otherwise from using or causing or permitting to be

used as a caravan site any land within the boundaries of the urban district of Egham without the prior grant of planning permission under the Town and Country Planning Act, 1947.

By about March 25, 1957, all the caravans on the Maindy site had been removed to the Royal Hythe Farm site and the first defendant informed the council of the withdrawal of his appeal in respect of the Maindy site and that his interest in that land had ceased. Meanwhile the defendant company had appealed to the Minister against the refusal of planning permission in respect of the Royal Hythe Farm site; by March 28 there were 119 caravans on the site and by April 3, 156. On June 4, 1957, a public local inquiry was held and on July 26 the Minister dismissed the appeal. Subsequently two applications for planning permission relating to other sites on Royal Hythe Farm were made on behalf of the defendant company. Both applications were refused and on October 23 enforcement notices were served. On November 30, 1957, notices of appeal against the refusal of those applications were given; another public local inquiry was held on February 10, 1958, and on April 24, 1958, the Minister dismissed the appeals.

The plaintiff alleged that since March, 1955, the first defendant had despite enforcement proceedings under the Act persistently and unlawfully used or permitted to be used as a caravan site land within the urban district of Egham and now jointly with the second and third defendants unlawfully used or caused or permitted to be used as a caravan site land the property of the third defendant at Royal Hythe Farm, and that by reason of their conduct in moving from one unauthorised site to another in that district the defendants were flouting the enforcement provisions of the Act and were bringing the law into disrepute. The defendants denied those allegations.

R. E. Megarry Q.C., *Neil McKinnon Q.C.* and *Andrew Leggatt* for the relator council. The defendants' course of conduct shows that they are using the machinery of the Town and Country Planning Act, 1947, in order to evade its provisions. The normal methods of enforcement of planning control provided by the Act have failed to produce discontinuance of the use of the defendants' land as a caravan site and, in the circumstances, the court has jurisdiction to grant the injunction sought. Section 12 (1) of the Act provides that " permission shall be required " in respect of any development of land; that is a clear, direct statement and amounts to a general statutory requirement that planning permission must be obtained before any development is carried out. If therefore, as here, development is carried out without the prior grant of planning permission the Act has not been complied with. It is true that section 18 makes provision for permission to be applied for after development has taken place, but this is not a case of retrospective permission, and no permission has been or (as they knew), would be granted to the defendants.

In *Attorney-General* v. *Bastow* [2] an injunction issued against

[2] [1957] 1 Q.B. 514; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

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a defendant who had persisted in retaining caravans on a particular site. It is appreciated that there is a distinction between the facts of that case, where there was a series of convictions, and the present case, where there has been a continual moving from site to site in order to avoid conviction, but a number of convictions are not a necessary preliminary to the granting of an injunction in relator proceedings: see *Attorney-General* v. *Wimbledon House Estate Co. Ltd.*[3] (where there had been only one conviction and the general statutory provision was analogous to section 12 (1) of the Act of 1947) and *Attorney-General* v. *Ashborne Recreation Ground Co.*[4] (where there had been no conviction at all); see, also, *Attorney-General* v. *Sharp*[5] approving both those decisions.

J. Ramsay Willis Q.C. and *B. Wingate-Saul* for the defendants. The court has no jurisdiction to grant the injunction claimed. Section 12 (1) of the Town and Country Planning Act, 1947, does not say that permission shall be required " before any development " is carried out " but " in respect of any development " and its words should not be equated with " it shall be unlawful to carry " out any development unless permission has been previously " granted." Such a construction would be inconsistent with section 18 which clearly envisages the carrying out of development without permission and makes provision for applications to be made for ex post facto permission to regulate the position. It is submitted that the words " permission shall be required " should be construed to mean " if permission is needed " and that development without permission, or when permission has been refused, merely puts the developer to the risk of having the development prohibited if the planning authority acting administratively so decide.

There can be no breach of a statute unless the statute says that an offence is committed. Under the Act of 1947 that point is not reached until after the planning authority have taken advantage of the provisions of section 23 and served an enforcement notice and the penal provisions of section 24 (3) have been brought into operation by the use of land in contravention of an effective enforcement notice. But whether or not permission is refused is an administrative matter for the planning authority, and the Minister on appeal, and until an enforcement notice is served and is effective, there can be no offence. Development without planning permission, therefore, is not in itself unlawful and the defendants in taking advantage of the administrative procedure laid down by the Act were not acting in breach of it.

Attorney-General v. *Bastow*[6] should be distinguished. The decision in that case depended upon the fact that a number of offences had been committed and that the defendant had acted in complete defiance of the law; the facts therefore were such that the courts had cognizance of the case as a criminal matter whereas here the planning authority and the Minister have cognizance of

[3] [1904] 2 Ch. 34; 20 T.L.R. 489.
[4] [1903] 1 Ch. 101; 19 T.L.R. 39.
[5] [1931] 1 Ch. 121; 46 T.L.R. 554.
[6] [1957] 1 Q.B. 514.

this case as a purely administrative matter. In *Attorney-General* v. *Sharp* [7] there had been a series of convictions; and in *Attorney-General* v. *Ashborne Recreation Ground Co.*[8] and *Attorney-General* v. *Wimbledon House Estate Co. Ltd.*,[9] which lead up to the decision in *Attorney-General* v. *Bastow*,[10] there had been a breach of a statute involving an offence and the injunction issued to restrain the breach taking place again. [Reference was also made to *Attorney-General* v. *London and North Western Ry.*,[11] *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*[12] and *Attorney-General* v. *Cockermouth Local Board.*[13]] To grant an injunction in terrorem covering a large area such as is sought here would be a very wide extension of the principle in those cases, for until the applications for planning permission had been finally determined nobody could say whether what had been done would become subject to the penal provisions of section 24 (3) and up to that stage the defendants had done nothing which they were not entitled to do.

If, as a matter of law, an injunction could issue in the circumstances of this case then it is submitted that it is not a case in which the court should exercise its discretion to grant an injunction. The defendants were entitled to apply for planning permission; up to the time when the enforcement notice in respect of Retreat Farm became effective no offence was committed and there has been no conviction in respect of the site at Royal Hythe Farm; there is nothing, therefore, to justify the conclusion that the defendants have acted or intend to act in deliberate defiance of the law.

R. E. Megarry Q.C. was not called on to reply.

LORD GODDARD C.J. This is an action by the Attorney-General, on the relation of the Egham Urban District Council, claiming an injunction restraining the defendants from using or causing or permitting to be used as caravan sites any land within the boundaries of the Urban District Council of Egham without previous planning permission.

The matter arises out of the provisions of the Town and Country Planning Act, 1947. It is (as I think everybody knows) a somewhat difficult Act in many respects; and the procedure laid down under it is very cumbersome in that a considerable time must very often elapse before the questions whether there has been "development" or whether permission will be granted can be finally determined, and a resolute defendant can make use of that state of affairs and may very likely develop land for certain purposes—and in this case we are concerned only with caravans, which seem to have a particular attraction for the provisions of the Act—and be able to take advantage of the delays which the

[7] [1931] 1 Ch. 121.
[8] [1903] 1 Ch. 101.
[9] [1904] 2 Ch. 34.
[10] [1957] 1 Q.B. 514.
[11] [1900] 1 Q.B. 79; 16 T.L.R. 30.
[12] (1882) 21 C.D. 752.
[13] (1874) L.R. 18 Eq. 172

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Act permits, so as to use land contrary to the terms of the Act, for a considerable period before the matter is finally decided.

The machinery of the Act is this. Section 12 (1) provides that "Subject to the provisions of this section and to the following "provisions of this Act, permission shall be required under this "Part of this Act in respect of any development of land which "is carried out after the appointed day." The sense of that section is obvious: it is that development of land carried out without permission is unlawful—it is contrary to the Act. But it does not follow, because it is contrary to the Act, that a penalty is incurred at once.

The scheme of the Act is that before you develop land you must apply for permission, and if you do not apply for permission, but nevertheless do any work on the land or make any use of it which can amount to "development" within the meaning of the Act, you do so at your own risk. An application for permission has to be made. If that permission is refused—and no doubt some time must elapse between the time when it is applied for and the time when the planning authority comes to a decision—an appeal lies to the Minister; and there are then provisions requiring the Minister to send down an inspector to hold an inquiry. That takes time. Then the inquiry is held: the inspector has to make a report: the report has to be considered by the Minister—and then a decision has to be given.

The time which all these things take is well illustrated by what happened with regard to the first of the sites with which we are dealing. The matter first started about April 12, 1955, when an enforcement notice was served alleging that the land had been used without permission—as it had been—since March 28; and the final decision was not given until December 31, so that nine months elapsed between the time when the site was first used without permission and the time when the Minister decided the matter in favour of the council—because the Minister's holding did amount to a decision that the council were justified in refusing permission.

Section 23 of the Act provides that if the planning authority consider that any work does amount to development for which no permission has been given they may serve an enforcement notice requiring the owner or occupier of the land to cease from putting the land to the use to which it is being put or to cease from doing the particular acts which amount to development. But directly an application for planning permission is made the enforcement notice is stayed until after the final determination of the application and is therefore stayed until after the appeal has been heard, so that in this case the enforcement notice was suspended for nearly nine months. If the Minister finally dismisses the appeal the enforcement notice, however, remains good and then, if the land continues to be used in contravention of the enforcement notice, the planning authority may issue a summons on which the magistrates may impose a fine of up to £50 for the breach and

a fine of £20 for every day on which, after the conviction, the use of the land continues without permission.

It seems that in March, 1955, the first defendant conceived the idea of using his farm, Retreat Farm, in Chertsey, for the purpose of a caravan site. It was not only going to be a site for just a few caravans, but it was quite obvious that he was minded to use it as a caravan, I was going to say "town," for it was obviously going to be for a great many caravans. The caravans were not being put there for the purpose merely of holidays but for the purpose of people living in them permanently.

By the Town and Country Planning General Development Order, 1950, the Minister granted a general permission to use land for certain purposes, as, for instance, the siting of caravans for a period of not more than 28 days in any one year and therefore if a farmer allows somebody to use land as a caravan site for a month during the summer holidays he will not be brought within the Act. But article 4 of the order gives the planning authority power, subject to the Minister's approval, to make a direction excluding that permission with regard to any particular district or place and in fact such a direction was made here. It is perfectly obvious that the policy of the council, their district lying, as it does, within what is known as the "Green Belt," is to prohibit the use of land for caravan sites, or caravan towns, or whatever one may like to call them, within their district. I have not the least doubt, in the circumstances of this case, that the defendants knew that perfectly well. The first defendant may not have known it when he first started, in March, 1955, to bring caravans on to the land, but I am quite sure that within a very short time he must have known that that was the deliberate policy of the council, and he set himself out to ignore that policy. If he could legally do that, he would be entitled to, and no one would attach any moral blame to him for that, but at the same time, he was taking on a very considerable risk, not only for himself but also for the people who were living in these caravans as permanent dwellings. It is a very serious thing, if planning permission is required and has not been obtained, to let these sites to unfortunate individuals who come there presumably in the belief that there is power to have the caravans where they are, and then find themselves in jeopardy on being turned out.

The history of the defendants' efforts to establish these caravan places in face of the refusal of planning permission is this. The first piece of land with which we are concerned, Retreat Farm, was first used on March 28, 1955, when five caravans were brought there. On April 12, 1955—within a fortnight—the council served an enforcement notice, to expire on May 16, requiring the removal of the caravans.

Under section 18 of the Act retrospective permission may be given for development which has been carried out without permission (or, as may easily be done, in ignorance of the requirements of the Act); so the defendant applied, on April 14, for

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permission to use this land, and to continue to use it, for a caravan site. On May 25 that permission was refused, so that he knew by then, at any rate, that that was the attitude which the council were likely to take up. There was nothing to show that their attitude had anything to do with the particular site. It may be that the defendant thought at the time that it had, although he has not told us so, but it must have become perfectly clear, as the history of the case developed, that the objection of the council was much more than to any particular site: it was because they are within the Green Belt and they were therefore determined not to have one of these mushroom towns springing up.

On July 18 the defendant appealed to the Minister, and on September 20 an inquiry was held. On December 31 the appeal was dismissed by the Minister, who made it quite clear that he was not upholding the decision of the council on the ground that there was some particular objection to the particular site, but that there was an objection to these caravan towns, or caravan settlements, going up in the council's district near Chertsey because it was in the Green Belt. The Minister, in dismissing the appeal, expressed the hope—he did not make it any condition—that the council would act reasonably and not too precipitately, because it involved the dispersal of these unfortunate people who had taken themselves to this caravan site and then found that the planning authority would not allow them to remain. The council certainly did act with great restraint, and it was not until May 3, 1956, that they served another enforcement notice to take effect on June 30. So that the defendant had had from December 31 to June 30 to comply with the notice—he had six months in which to get the land cleared of these caravans.

On June 20, hope, I suppose, springing eternal in the mortal breast, he made a further application for permission. He did not know, but quite obviously he could expect that it would be refused, as it was, on August 9. On August 14 the planning authority, who by this time thought, no doubt, that the first defendant was simply defying them, issued a summons which was returnable on September 5. The magistrates convicted the first defendant and imposed a fine of £25 and costs—which considering the defiance (practically) which he had shown, was certainly a very moderate fine.

The first defendant did not pay any attention to that but still kept the caravans on his land at Retreat Farm, and on September 26 the council took out a summons for the daily penalty. I expect that that made him think, for as the daily penalty was £20, a very considerable sum had already mounted up. So he got his caravans out; on October 7 they were moved to the next-door field. That simply meant that he was going to keep the caravans. As he had been turned off one site he was going to take another site. So he moved from one field to another, and there, on a site called Maindy, he installed the caravans. On November 6, after they had been there for a month without permission, he

applied again for permission, and on January 15, 1957, it was refused. He may have thought (or I will assume that he thought) that he could use Maindy for a further 28 days under the general permission in the General Development Order, but on January 25, 1957, the direction made by the council under article 4 of the order came into force.

On February 9 the first defendant appealed to the Minister against the refusal of planning permission in respect of the Maindy site. On February 13 an enforcement notice was served, taking effect on March 16. But on March 23 the caravans had gone. The defendant said that he had parted with any interest that he had in the land, because by this time, apparently, he had got the idea of going to another adjoining site which is referred to as Royal Hythe Farm. The history with regard to Royal Hythe Farm is this. The defendant company, of which the first defendant was a director, had now come into the picture and on January 26, 1957, applied for planning permission; it was here that the warning notices saying that the site was an unauthorized site were put up and on the very day on which permission was applied for the caravans started to move in. A very considerable number had moved in by February 6, the date when planning permission was refused. That did not daunt the defendant because, by March 28, there were 119 caravans there, and by April 3, 156. By this time an appeal had been made to the Minister, and the council had applied to the court for an interim injunction; but when the summons came before the judge in chambers, no order was made because counsel gave an undertaking that no more caravans would be moved on to the site. But there they were: there were 156. On June 4 another public inquiry was held and on July 26 the appeal was again dismissed.

On August 29 application was made to put the caravans on another part of Royal Hythe Farm, moving them quite a short distance. This really shows that it was getting to be, I might almost say, something in the nature of a scandal, because everybody knew by this time that it was not the particular field that was objected to but that the council were not going to have these caravan sites. On September 18 that application was refused. The undertaking had been given; but the applications and appeals went on.

The writ in this action was issued on March 11, 1957, but I have mentioned the matters which happened after that date as showing that the defendants intended to hold the Act at defiance as far as they could by going on making these repeated little moves from one field to another, or from one part of the farm to another part of the farm, and then applying for permission which they knew they would not get, and then appealing to the Minister and then getting an inquiry, so that they could get 15 or 16 months' grace, during which they could let caravans be on the site and could take the profits for them. On October 23 further enforcement notices were served. On November 30 there was an

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appeal to the Minister, and that appeal followed the way of all the other appeals and the Minister refused to disturb the decision of the council.

It has been submitted to me that because the Act provides penalties, and because there is no offence committed before an enforcement notice has been disregarded, I ought not to grant an injunction. I think that the cases which have been cited—particularly *Attorney-General* v. *Wimbledon House Estate Co. Ltd.*,[1] cited and followed by Devlin J. in *Attorney-General* v. *Bastow*[2]—show that, although a statute may provide a penalty for acts done in breach of it, or in respect of acts done for which it provides a penalty, if it is a matter of public right then the Attorney-General is entitled, on behalf of the public, to apply for an injunction. The Town and Country Planning Act, 1947, is an Act which is designed to confer a benefit on the public: it is for the orderly development of the countryside, to prevent unsightly development, to prevent the development of too crowded areas, to prevent the development of industrial buildings and plant in what should be a residential district, and for the mapping out of residential districts and industrial districts and so forth. It is obviously an Act which is designed for the public good and can be used for great public advantage. Therefore, if a defendant shows by his conduct that he intends to avoid the Act and act in breach of it so far as he can and for as long as he can, then the Attorney-General is entitled to an injunction such as was granted in the cases which have been cited to me.

In this case I think that it is quite clear that the defendants having got their caravans on to a particular site, started by carrying on a fight with regard to that for a good many months. The first defendant carried on that fight from March to December; then, although the appeal had been dismissed, he took no notice; but—because the council acted reasonably so as to allow the unfortunate people living in the caravans time to get out—managed to carry on the fight for another six months. So that from March, 1955, to the end of September, 1956, the defendant had the advantage of letting caravan sites, which he had developed without permission, and permission for which had been withheld all the way through: he got a run, therefore, of somewhere near 18 months. It is clear that by moving the caravans to the field next door he meant to continue using land for this purpose, which was a development for which he had no permission. It was only when he found that he could not get any further with that site—although he managed to keep the caravans there from October 7 till March 22, so he had another pretty good run—that the defendants decided to go to Royal Hythe Farm, and they have been using the Royal Hythe Farm site for caravans since January 26, 1957, and I understand the caravans are still there, although the Minister dismissed the appeal on July 26.

[1] [1904] 2 Ch. 34; 20 T.L.R. 489.

[2] [1957] 1 Q.B. 514; [1957] 2 W.L.R. 540; [1957] 1 All E.R. 497.

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That shows an intention by the defendants, who have been refused planning permission time and time again, to act in defiance of the Town and Country Planning Act, and to use its machinery not for the purpose of making genuine applications for permission but for the purpose of delay. In the first instance I would not say that the first defendant was not perfectly entitled to appeal to the Minister, but when he got the result of the appeal the defendants knew quite well that the Minister was upholding the policy which the council were evidently following—that is to say, not to permit the use of land for caravans within their area because it was in the Green Belt. The Minister upheld that policy and yet the defendants went on in this way.

I think, therefore, that this is a case in which I have jurisdiction to grant an injunction; and if I have such jurisdiction I most certainly, as a matter of discretion, will grant it. There will, therefore, be judgment for the plaintiff. The defendants must pay the costs of the action.

Order accordingly.

Solicitors: *Champion & Co.; Clarke & Co.*

J. F. L.

[PRIVY COUNCIL.]

CLIFFORD JOHN CHICK AND ANOTHER . . APPELLANTS;

AND

COMMISSIONER OF STAMP DUTIES . . RESPONDENT.

J. C.*

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June 17.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Australia (New South Wales)—Revenue—Death duty—Gift—Exclusion of donor—Gift of grazing property—Subsequent use of property by donor and donee under partnership agreement—Not "retained" by donee to the "entire exclusion" of donor—Dutiable estate of donor—Stamp Duties Act, 1920–56 (*N.S.W.*), *s.* 102 (2) (*d*).

By section 102 of the New South Wales Stamp Duties Act, 1920–56: "For the purposes of the assessment and payment of "death duty . . . the estate of a deceased person shall be deemed "to include and consist of the following classes of property:— ". . . (2) (*d*) Any property comprised in any gift made by the "deceased at any time . . . of which bona fide possession and "enjoyment has not been assumed by the donee immediately upon "the gift and thenceforth retained to the entire exclusion of the "deceased . . ."

In 1934 a father transferred by way of gift to one of his sons a pastoral property, the gift being made without reservation or qualification or condition. In 1935, some 17 months after the gift,

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* *Present*: VISCOUNT SIMONDS, LORD TUCKER, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW, LORD DENNING.

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the father, the donee son and another son entered into an agreement to carry on in partnership the business of graziers and stock dealers. The agreement provided, inter alia, that the father should be the manager of the business and that his decision should be final and conclusive in connexion with all matters relating to its conduct; that the capital of the business should consist of the livestock and plant then owned by the respective partners; that the business should be conducted on the respective holdings of the partners and such holdings should be used for the purposes of the partnership only; that all lands held by any of the partners at the date of the agreement should remain the sole property of such partner and should not on any consideration be taken into account as or deemed to be an asset of the partnership, and any such partner should have the sole and free right to deal with it as he might think fit.

Each of the three partners owned a property, that of the donee son being that which had been given to him by his father in 1934, and each partner brought into the partnership livestock and plant, and their three properties were thenceforth used for the depasturing of the partnership stock. That continued up to the death of the father in 1952:—

Held, that the value of the property given to the son in 1934 was to be included in computing the value of the father's estate for the purposes of death duty. While it was not disputed that the son had assumed bona fide possession and enjoyment of the property immediately upon the gift to the entire exclusion of the father, he had not, on the facts, thenceforth retained it to the father's entire exclusion, for under the partnership agreement, and whatever force and effect might be given to that part of it which gave a partner the sole and free right to deal with his own property, the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted.

Where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact to be determined, and, if he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee.

Oakes v. *Commissioner of Stamp Duties of New South Wales* [1954] A.C. 57; [1953] 3 W.L.R. 1127; [1953] 2 All E.R. 1563 considered.

Commissioner of Stamp Duties (N.S.W.) v. *Owens* (1953) 88 C.L.R.(Aus.) 67 approved.

It was irrelevant that the father gave (if he did give) full consideration for his right as a member of the partnership to possession and enjoyment of the property that he had given to his son.

Dictum of Isaacs J. in *Lang* v. *Webb* (1912) 13 C.L.R.(Aus.) 503 at 517 approved.

Judgment of the Supreme Court of New South Wales affirmed.

APPEAL (No. 6 of 1958) from a judgment of the Supreme Court of New South Wales (June 28, 1957) on a case stated by the respondent, the Commissioner of Stamp Duties of New South Wales, under section 124 of the New South Wales Stamp Duties Act, 1920–56.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The question raised by this appeal was whether certain pastoral property near Gurley known as "Mia Mia," which on April 21, 1952, the date of the death

of John Chick (hereinafter called "the deceased"), belonged to his son, Clifford John Chick, should be included in the dutiable estate of the deceased. The respondent claimed that it should be included and the Supreme Court (Street C.J., Roper C.J. in Eq., and Walsh J.) upheld his claim. Against that decision the appellants, the executors of the deceased, appealed.

The respondent rested his claim upon section 102 (2) (*d*) of the Stamp Duties Act which, at the relevant date, was in the following terms:—"Section 102.—For the purposes of the assessment "and payment of death duty but subject as hereinafter provided, "the estate of a deceased person shall be deemed to include and "consist of the following classes of property:— . . . (2) (*d*) Any "property comprised in any gift made by the deceased at any "time, whether before or after the passing of this Act, of which "bona fide possession and enjoyment has not been assumed by "the donee immediately upon the gift and thenceforth retained "to the entire exclusion of the deceased, or of any benefit to him "of whatsoever kind or in any way whatsoever whether enforce-"able at law or in equity or not and whenever the deceased died."

The material facts can be briefly stated. On February 19, 1934, the deceased transferred by way of gift to his son, the appellant Clifford John Chick, the property "Mia Mia" together with the improvements thereon. That gift was made without reservation or qualification or condition. The donee was then living in a homestead erected on the property and continued to do so until the death of the deceased in 1952.

On July 25, 1935, some 17 months after the gift, the deceased and the said Clifford John Chick and another son, the appellant Jack Wesley Chick, entered into an agreement to carry on in partnership the business of graziers and stock dealers under the name or style of John Chick & Sons. The agreement provided (by clause 1) that the partnership should commence or be deemed to have commenced on July 1, 1935, and, subject to the conditions thereof, should continue until dissolved in manner thereinafter appearing; (by clause 2) that the deceased should be the manager of the said business and that his decision should be final and conclusive in connexion with all matters relating to its conduct; (by clause 4) that the capital of the business should consist of the livestock and plant then owned by the respective partners or thenceforth to be acquired in connexion with the business; (by clause 5) that the said business should be conducted on the respective holdings of the partners at or near Gurley and such holdings should be used for the purposes of the partnership only; (by clause 12) that the partnership might be terminated as therein mentioned and (by clause 13) that any and all lands held by any of the partners at the date of the agreement or acquired afterwards should be and remain the sole property of such partner and should not on any consideration be taken into account as or deemed to be an asset of the partnership and any such partner holding any such

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land should have and retain the sole and free right to deal with the same as he might think fit.

In pursuance of that agreement each of the partners brought into the partnership livestock and plant previously owned by him. Each of them also at the date of the agreement owned a property near Gurley (the property of Clifford John Chick being "Mia "Mia") and their three properties were thenceforth used for the depasturing of the partnership stock. That continued up to the death of the deceased. In computing the final balance of his estate for the purposes of the Act the respondent included the value of "Mia Mia," thus bringing up the total amount of duty chargeable from £13,590 to £27,100 11s. 6d. He contended that the facts which have been stated precluded the appellants from claiming that the bona fide possession and enjoyment of the property, though it might have been assumed by the donee immediately upon the gift, was thenceforth, that is, at all times until the death of the deceased, retained by him to the entire exclusion of the deceased or any such benefit to him as was mentioned in the subsection. The Supreme Court upheld that contention.

The executors appealed.

1958. May 13, 14, 15. *Sir Garfield Barwick Q.C.* and *Robert Ellicott* (both of Australia) for the appellants.

Gordon Wallace Q.C. (of Australia) and *Anthony Cripps Q.C.* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Lord Advocate* v. *Stewart* [1]; *Attorney-General* v. *Seccombe* [2]; *O'Connor* v. *Commissioner of Succession Duties (S.A.)* [3]; *Owens* v. *Commissioner of Stamp Duties* [4]; *Permanent Trustee Co. of New South Wales Ltd.* v. *Commissioner of Stamp Duties (N.S.W.)* [5]; *In re Nichol (Decd.), Johnstone* v. *Commissioner of Stamp Duties (No. 2)* [6]; *Commissioner of Stamp Duties* v. *Shrimpton.* [7]

June 17. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: It is not in dispute that the donee assumed bona fide possession and enjoyment of the property immediately upon the gift to the entire exclusion of the deceased or of any such benefit to him as is mentioned in the subsection. The question is whether he also thenceforth retained it and this depends on the impact of the subsection on the facts. Their Lordships have no doubt that the Supreme Court were right in upholding the contention of the respondent.

[1] (1906) 8 F. 579.
[2] [1911] 2 K.B. 688.
[3] (1932) 47 C.L.R.(Aus.) 601.
[4] (1952) 53 S.R.(N.S.W.) 379.
[5] (1954) 91 C.L.R.(Aus.) 1.
[6] [1931] N.Z.L.R. 718.
[7] [1941] N.Z.L.R. 761.

The respondent took his stand upon the plain words of the section. How, he asked, could it be said that the deceased was entirely excluded from the property, the subject of the gift, or from the possession and enjoyment thereof, when for some 17 years before his death he had been a member of a partnership, whose right it was to agist their stock upon it, and himself, moreover, was the manager of the partnership business with the power to make final and conclusive decisions upon all matters relating to it. The "objective and outward facts" (to use an expression of Isaacs J. in *Commissioner of Stamp Duties (N.S.W.)* v. *Thomson* [1]) were, he urged, wholly inconsistent with such exclusion. To this simple presentation of the case no adequate answer, as it appeared to their Lordships, was given by the appellants. Whatever force and effect might be given to clause 13 of the partnership agreement, upon which the appellants appeared to place some reliance, other parts of the agreement, and in particular clause 5, put it beyond doubt that the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted.

It is, however, right to refer to some of the contentions which were advanced on behalf of the appellants. In the first place, it is not disputed that the property was given outright by the deceased to his son. As was said by Dixon C.J. in *Commissioner of Stamp Duties* v. *Owens* [2]: "If ever there was a gift of an "estate in fee simple, carrying the fullest right known to the "law of exclusive possession and enjoyment, surely this was such "a gift." It follows that the decision of this Board in *Munro* v. *Commissioner of Stamp Duties*,[3] on which the appellants relied, has no application to the present case. It must often be a matter of fine distinction what is the subject-matter of a gift. If, as in *Munro's* case,[3] the gift is of a property shorn of certain of the rights which appertain to complete ownership, the donor cannot, merely because he remains in possession and enjoyment of those rights, be said within the meaning of the section not to be excluded from possession and enjoyment of that which he has given. This view of the section, which was reaffirmed in *St. Aubyn* v. *Attorney-General* [4] upon a consideration of a similar section in a British statute, need not be further elaborated. But the question may arise and, having arisen, may lead to a difference of opinion as to what is the subject-matter of the gift. It was, as it appears to their Lordships, for this reason that in *Owens'* case [5] Williams J. and Taylor J. dissented from the majority of the court. In the present case there is no room for any such difference.

Then it was contended that the subsection had no operation because the partnership agreement was an independent commercial transaction for full consideration later than and in no way

[1] (1927) 40 C.L.R.(Aus.) 394, 408.
[2] (1953) 88 C.L.R.(Aus.) 67, 88.
[3] [1934] A.C. 61.
[4] [1952] A.C. 15, 21; [1951] 2 All E.R. 473.
[5] 88 C.L.R.(Aus.) 67.

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related to the gift, and was a mode of enjoyment by the donee of his property and an exercise by him of the possession of it. (These are the words of the appellants' second formal reason.) In this reason there are several elements. The partnership agreement was "later" than the gift. This point was not pressed by counsel for the appellants. If possession and enjoyment are "thenceforth" to be retained by the donee, it is clearly irrelevant that there is an interval between the dates when the donor is excluded and ceases to be excluded. Nor is there wanting ample authority which shows that this is an irrelevant consideration. A recent example is *Commissioner of Stamp Duties of New South Wales* v. *Permanent Trustee Co. of New South Wales* (*Davies'* case).[6] Next, it was an "independent commercial "transaction for full consideration." It is to be assumed that it was an "independent" transaction: there was no evidence to the contrary. But the subsection says nothing about independent transactions. The sole question is one of fact—was the donor excluded? If he was not excluded, it is not relevant to ask why he was not excluded. Equally with regard to the transaction being "commercial" and "for full consideration." Their Lordships see no reason why a gloss should be put upon the plain words of the subsection by excluding from its operation such transactions. As long ago as 1912 in *Lang* v. *Webb*[7] (a case where a testatrix gave certain blocks of land to her sons and on the same day took leases from them of the same land) Isaacs J. said[8]: "The lease, however, gave to the donor possession and "enjoyment of the land itself, which is a simple negation of "exclusion, and brings the case within the statutory liability. "It was argued that as the rent was full value, the lessee's "possession and occupation were not a benefit. The argument is "unimportant because the lease, at whatsoever rent, prevents "the entire exclusion of the donor." This view of the subsection has never been departed from and their Lordships respectfully adopt the words of Isaacs J. in the present case. It is irrelevant that the donor gave (if he did give) full consideration for his right as a member of the partnership to possession and enjoyment of the land that he had given to his son.

Then it is said that the transaction was "in no way related "to the gift and was a mode of enjoyment by the donee of his "property." The words "related to the gift" are no doubt an echo of the words "referable to the gift" which are to be found in *Munro's* case[9] and *St. Aubyn's* case,[10] and are lucidly explained by Dixon C.J. in *Owens'* case[11] and at an earlier date by Owen A.J. in *Rudd* v. *Commissioner of Stamp Duties*.[12] They might become of importance if it was the second limb of the subsection which was under consideration and the question, therefore, was whether the donor had been entirely excluded from any

[6] [1956] A.C. 512; [1956] 3 W.L.R. 152; [1956] 2 All E.R. 512.
[7] (1912) 13 C.L.R.(Aus.) 503.
[8] Ibid. 517.
[9] [1934] A.C. 61.
[10] [1952] A.C. 15.
[11] 88 C.L.R. 67, 85.
[12] (1937) 37 S.R.(N.S.W.) 366, 392.

benefit of whatsoever kind. But it is difficult to see what bearing they have when the simple question is whether the donor has been excluded from the subject-matter of the gift, a pastoral property known as "Mia Mia," and the clear answer is that he has not. Finally, the words "was a mode of enjoyment by the "donee of his property" may be linked with the appellants' contention that the subsection was not applicable because (again to cite the formal reason) "neither the partnership agreement nor "the use of the property pursuant thereto impaired or detracted "from bona fide possession and enjoyment by the donee of the "property given." This contention, in their Lordships' opinion, involves a misconception, for which the subsection provides no justification. It may be that the donee can make no better use of the property given to him than, for instance, by leasing it back to the donor. The question still is whether as a fact the donor has been excluded. This appears to be the contention raised in another form that a commercial transaction is not within the subsection. The answer is that the possession and enjoyment by the donee of the property given to him in the manner most advantageous to himself are by no means incompatible with the donor not being excluded from it. It was, however, natural that the appellants should refer to and rely on the case of *Oakes* v. *Commissioner of Stamp Duties of New South Wales*.[13] In that case the testator, who owned a grazing property in New South Wales, executed a deed poll under which as from July 1, 1924, he held the property upon trust for himself and his four children as tenants in common in equal shares. The deed gave him wide powers of management and in particular provided that in addition to reimbursing himself all expenses of administration he was to be entitled to remuneration for all work done by him in managing the trust property on which he resided with his family in his capacity as trustee and manager in the same manner and as fully in all respects as if he were not a trustee thereof. He continued to manage the trust property until his death, receiving certain varying sums annually as remuneration, and after deducting these and other outgoings and expenses he divided the profits from the property into five equal shares, crediting one share to himself and one to each of his children. The children's shares he applied during their minority for their maintenance and education and paid them to the children when they came of age. The remuneration taken by the testator for managing the property was assumed to be appropriate and reasonable for any other manager.

On these facts the commissioner claimed that the whole of the trust property should be included in the testator's estate for the purpose of duty. This claim was upheld by the High Court.[14] The decision of the High Court was affirmed by this Board in a judgment delivered by Lord Reid, in the course of which certain

[13] [1954] A.C. 57; [1953] 3 W.L.R. 1127; [1953] 2 All E.R. 1563.

[14] (1952) 85 C.L.R.(Aus.) 386.

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observations were made which, taken out of their context, appear to be favourable to the appellants. It had been argued on behalf of the commissioner that the testator derived a benefit within the meaning of the subsection from the fact that he had applied the trust income in the maintenance of his children and, if it had not been available, would have had to spend more of his own. This contention was rejected, Lord Reid saying [15]: "... their Lordships will assume that there was some advantage "to the deceased: but that advantage was not at the expense "of the children and did not impair or diminish the value of the "gift to them or their enjoyment of it. It is possible for a donee, "in the full and unrestrained enjoyment of his gift to use or "spend it in a way that happens to produce some advantage to "the donor without there being any loss or disadvantage to the "donee. But, in their Lordships' judgment, any such advantage "is not a benefit within the meaning of the section. The point "is not strictly covered by authority, but the contrary view would "be difficult to reconcile with what was said in the House of "Lords in *St. Aubyn's* case.[16]" A passage to the same effect appears later in the judgment. Having disposed of this contention, the Board then dealt with the benefit derived by the testator from his management of the property and held that it was such a benefit as to bring the subsection into operation.

But it was the cited passage on which the appellants relied. Applying it to the facts of this case they said that the partnership agreement and all that was done under it by the deceased may have been beneficial to him, but the benefit or advantage derived by him did not impair or diminish the value of the gift of the property to the donee. On the contrary, it was the method most advantageous to the donee of dealing with the property. It was therefore not a benefit to the donor which brought the subsection into operation. Their Lordships cannot accept this view. It is in flat contradiction to the law cogently stated by Isaacs J. in *Lang* v. *Webb* [17] at an earlier stage in this opinion which has been consistently followed. Where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact to be determined. If he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee. It must be observed that in *Oakes'* case [18] the Board appears to have been dealing with the second limb of the subsection, the question being whether the donor was entirely excluded from any benefit to him of whatsoever kind or in any way whatsoever. It is possible that in the consideration of this very difficult part of the subsection it may be pertinent in some cases to inquire whether the benefit derived by the donor is one that impairs or detracts from the donee's enjoyment of the gift. Their Lordships, with great respect, think that this is a matter which may require

[15] [1954] A.C. 57, 73.
[16] [1952] A.C. 15.
[17] 13 C.L.R.(Aus.) 503, 517.
[18] [1954] A.C. 57.

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further examination, but, as they have already said, they are clearly of opinion that it is not a relevant consideration where the question arises under the first limb of the subsection and is whether the donor has been entirely excluded from the subject-matter of the gift, and they repeat that in the present case that question can only be answered in the negative.

Counsel for the appellants in the course of his argument conceded that he could only succeed if it was held that *Owens'* case,[19] to which reference has been already made, was wrongly decided. Their Lordships therefore think it right to say that they agree with the reasoning and conclusion of the majority of the High Court in that case.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs of this appeal.

Solicitors: *Waltons & Co.; Light & Fulton.*

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[19] 88 C.L.R.(Aus.) 67.

[CHANCERY DIVISION.]

In re WILLS' WILL TRUSTS. WILLS *v.* WILLS.

1958
Apr. 24, 25, 28, 29; *May* 23.
Upjohn J.

[1957 W. 2402.]

Trust and Trustee — Power of advancement — Validity — Remoteness — Power to apply vested or contingent share of any person interested under will for his or her benefit or benefit of child or children — Meaning of "vested" — Whether power void for remoteness.

Trust and Trustee — Power of advancement — Exercise of power — Settlement — Will — Express power contained in settlement to "raise" part of fund for benefit of children and grandchildren of settlor — Settlement on contingent trusts for infant grandsons — Whether valid exercise of power — Meaning of "raise."

By clause 14 of his will a testator gave his residuary estate on trust as to two fifth parts for his wife for life and as to three fifth parts for his children who, being male, should attain the age of 25, or, being female, should attain that age or marry under it; and after the death of his wife as to the two fifth parts on the same trusts as those concerning the three fifth parts. By clause 15 the share of each daughter was settled on her for life with remainder to her issue.

Clause 18 provided that the trustees "after the determination or "failure of every prior life or other interest . . . or previously "thereto with the consent in writing of every person in existence for "the time being entitled to any such prior interest . . . whether "vested or contingent to raise any part . . . of the then expectant "contingent presumptive or vested share portion or legacy of any "person under any of the trusts . . . [of the will] . . . and to pay "or apply the same for his or her advancement or benefit or for the

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"benefit of any child [or] children . . . of such person" as the trustees should think fit.

The testator died on October 11, 1927, leaving surviving him five children, the eldest being a son, M., who was born on October 4, 1915. In 1939 M. married and on May 31, 1940, twin sons were born when M. was on active military service and four months short of his 25th birthday. On June 15, 1940, the trustees in purported exercise of the power contained in clause 18 of the will executed a deed reciting that they had appropriated certain investments to the share of residue to which M. was contingently entitled, and declaring that those investments should be held on certain trusts for the twin sons of M. on their attaining the age of 21, and if they failed to attain that age, then on the trusts applicable if the deed had never been executed.

On June 26, 1941, another son was born to M., who duly attained the age of 25 but died on March 16, 1943, on active service.

On a summons to determine whether the advancement clause in the will was void for remoteness, and whether, if not, the deed of 1940 was a valid exercise of the power conferred by it:—

Held, (1) that "vested" in clause 18 of the will meant vested in interest and the power of advancement came to an end in respect of sons' shares when the share vested absolutely, that is, as and when each son attained the age of 25; accordingly, in relation to M.'s share, the power contained in clause 18 was valid and did not offend the rule against remoteness.

Assuming that in the case of daughters' shares the power was void, that did not invalidate the power in relation to sons' shares.

(2) That, although no settlement made by way of advancement upon an object of the power by trustees must conflict with the principle delegatus non potest delegare, trustees exercising a power of advancement might otherwise validly make settlements upon such objects if the particular circumstances of the case warranted that course as being for their benefit.

Roper-Curzon v. *Roper-Curzon* (1871) L.R. 11 Eq. 452; *In re Halsted's Will Trusts* [1937] 2 All E.R. 570; *In re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332 and *In re Meux* [1958] Ch. 154; [1957] 3 W.L.R. 377; [1957] 2 All E.R. 630 applied.

In re May [1912] 2 Ch. 622 and *In re Mewburn's Settlement* [1924] 2 Ch. 498 distinguished.

(3) That in the present case an immediate application effected by a simple settlement creating contingent interests was for the benefit of the twins in case M. should die under the age of 25, of which there was a real risk.

(4) That the investments were "raised" by being taken out of the trusts of residue and held on new trusts for the benefit of the twins; and that, accordingly, the deed of 1940 was a valid exercise of the power contained in clause 18 of the will.

ADJOURNED SUMMONS.

By this summons, the plaintiffs, the trustees of the will of Frederick Noel Hamilton Wills (hereinafter referred to as "the "testator"), asked the court to determine whether a settlement made by deed poll dated June 15, 1940, and made by the trustees in exercise of the power vested in them by clause 18 of the will of the testator, was a valid settlement or was an invalid settlement because the said power was void for perpetuity.

The facts are taken from the judgment of Upjohn J.

The testator made his will on June 2, 1918. After appointing executors and trustees, he bequeathed a number of legacies and disposed of his residuary estate by clause 14, which provided: "Subject as aforesaid I direct that my trustees shall hold my "residuary estate upon trust as to two equal fifth parts thereof "to pay the income thereof to my said wife during her life "without power of anticipation during coverture in addition to "the other benefits hereinbefore given to her and from and after "the death of my said wife shall hold the capital and future "income of the said two fifth parts of my residuary estate upon "the trusts hereinafter declared of and concerning the remaining "three equal fifth parts thereof And as to the remaining three "equal fifth parts of my residuary estate I direct that my "trustees shall hold the same upon trust for all or any my "children or child who being male shall attain the age of twenty-"five years or being female shall attain that age or marry under "it and if more than one in equal shares except that each son "shall take three times as much as each daughter." By clause 15 the testator settled the daughters' shares on trust for the daughter for life with remainder to her issue as she should appoint and with trusts in default of appointment. By clause 18 the testator gave a power of advancement as follows: "I authorize my trustees after the determination or failure of "every prior life or other interest or interests (if any) or previously "thereto with the consent in writing of every person in existence "for the time being entitled to any such prior interest or interests "whether vested or contingent to raise any part or parts not "exceeding in the whole one moiety of the then expectant "contingent presumptive or vested share portion or legacy of "any person under any of the trusts or dispositions of this my "will or any codicil hereto and to pay or apply the same for his "or her advancement or benefit or for the benefit of any child "children or wife of such person as my trustees shall think fit "And I declare that the power of advancement aforesaid may "be exercised in favour of any daughter of mine in respect of her "share notwithstanding that she is entitled to a life interest only "therein."

The testator died on October 11, 1927, and his will was duly proved by the executors therein named. At the date of his death the testator left him surviving five children, all infants, of whom the eldest was Michael Desmond Hamilton Wills (hereinafter referred to as "Captain Wills"). He was born on October 4, 1915. He married the fourth defendant, Mary Margarent Gibbs, in 1939 and of that marriage there was issue three children, namely, two twins, the first and second defendants, who were born on May 31, 1940, and the third defendant, who was born on June 26, 1941. Captain Wills duly attained the age of 25 but died on war service on March 16, 1943. On June 15, 1940, when the twins were some fortnight old, the then trustees (who were not the original executors and trustees appointed by the

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testator's will) executed a deed declaring certain trusts in purported exercise of the power conferred by clause 18 of the will. The deed contained a number of recitals, those material to this report being the last two, (E) and (F), which recited that certain investments including the investments mentioned in the schedule thereto had been appropriated by the trustees to the share of the residuary estate to which Captain Wills was contingently entitled and that for the benefit of the infant sons of Captain Wills the trustees had determined to execute those presents. By the operative part of the deed in purported exercise of the power contained in clause 18 of the will the trustees irrevocably declared and directed that the investments mentioned in the schedule thereto should thenceforth be held upon the trusts following: "(i) If both the elder twin and the younger twin attain the age "of twenty-one years as to three equal fourth parts thereof in "trust for the elder twin if and when he attains twenty-one and "as to the remaining one equal fourth part in trust for the "younger twin if and when he attains that age. (ii) If the elder "twin attains but the younger does not attain the age of twenty-"one years as to the whole in trust for the elder twin if and "when he attains that age. (iii) If the elder twin dies under "the age of twenty-one years as to the whole in trust for the "younger twin if and when he attains that age. Provided "always that if neither the elder nor the younger twin attains the "age of twenty-one years the investments aforesaid shall be held "upon the trusts which would have been applicable thereto if "this deed had never been executed and provided also that until "some person or persons shall become absolutely and indefeasibly "entitled to the investments aforesaid the provisions now applic-"able thereto under the will of the testator and the said deed of "appointment as to investment and variation of the investment "thereof shall continue to be operative."

By his will Captain Wills gave a third of his residue to his widow absolutely and two-thirds to his children who should attain 21.

J. A. Brightman for the trustees.

C. Montgomery White Q.C. and *D. H. McMullen* for the first and second defendants.

Lionel Edwards Q.C. and *E. B. Stamp* for the third defendant.

T. A. C. Burgess for the fourth and fifth defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In re Vaux* [1]; *In re de Sommery* [2]; *In re Allott* [3]; *In re Winch's Settlement.* [4]

Cur. adv. vult.

[1] [1939] 1 Ch. 465; 55 T.L.R. 92, 230; [1938] 2 All E.R. 177; [1938] 4 All E.R. 297 (C.A.).

[2] [1912] 2 Ch. 622.

[3] [1924] 2 Ch. 498.

[4] [1917] 1 Ch. 633; 33 T.L.R. 213.

May 23. UPJOHN J. read the following judgment: This summons raises two interesting questions upon the will of the late Frederick Noel Hamilton Wills, deceased, who I will refer to as "the testator." The first question is whether a power of advancement contained in clause 18 of the will is valid or is void for remoteness, and the second question is whether, assuming the power to be valid, a purported exercise of it in 1940 is a valid exercise of that power.

[His Lordship stated the facts and continued:] The issue, therefore, is between the twins on the one hand, who support the validity of the deed of 1940, and the youngest son on the other hand who, of course, takes no benefit thereunder unless both of his elder brothers fail to attain 21. Captain Wills' widow is in the same interest as the youngest son, but she has in fact taken no part in the argument.

Mr. Edwards, for the youngest son, submits that the power contained in clause 18 of the will is void for remoteness on two grounds. First he submits that if you look at the opening words of the clause, it is clear that the power may apply to a vested share where there has been no prior life interest. Therefore it must follow that "vested" must mean not merely vested in interest but vested in possession. Then he submits that on its true construction the clause applies to a son's vested share after it has vested in possession, with this result, that a son on attaining 25 would not have an absolute right to call upon the trustees to transfer his vested share to him because the trustees would be entitled to say, and possibly bound to say, that they would not transfer his share to him because they might desire to exercise the power of advancement in favour of his wife or children. If that be the true construction of the power it may well be that it would infringe the rule against remoteness, but I am quite unable to accept this argument. It is to be observed that the power applies not merely to the sons' shares but to the daughters' shares of residue and to legacies given by the will or any codicil. The opening words of clause 18 were no doubt widely framed to meet a number of possible situations, and I am quite unable to construe the clause as giving the trustees not a power of advancement pending vesting in possession but in effect a power of defeasance which can operate after a share has vested absolutely in possession. A power of advancement is intended to permit the donee of the power to anticipate the absolute vesting of a share, but when the share has vested absolutely the power necessarily comes to an end. In my judgment, "vested" in clause 18 bears its prima facie meaning of vested in interest; see Theobald on Wills, 11th ed., p. 475.

Mr. Edwards' second submission is this. You must look at the state of affairs at the testator's death. At that time no share of residue had vested at all. Then he submits, truly, that for the purpose of the rule you may look at possible events. One possible event would be that the whole share of residue would

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vest in a daughter. If that happened, he submitted, then in relation to a daughter's share the power of advancement is plainly bad for remoteness. Whether that be so or not I am not going to decide in the absence of the parties directly concerned, but I will assume, for the purposes of argument, that so far Mr. Edwards' submission is sound and that in the case of daughters' shares the power is void. In my judgment, however, that does not in the least invalidate the power in relation to sons' shares. As I have already pointed out, the power applies not only to shares of residue but to legacies given by the will or by any codicil, and it seems to me clear that the power must be looked at in relation to the interest taken by the person who is to be advanced. Under some trusts in the will or codicil it may be that the power is invalid; under other trusts it may be valid. Taking the view that I do, that upon its true construction the power comes to an end in respect of sons' shares as and when each son attains 25, no question of invalidity on the ground of remoteness can arise in relation to a son's share. Accordingly, in my judgment, in relation to Captain Wills' share the power of advancement contained in clause 18 is valid and does not offend the rule against remoteness, and I shall so declare.

I turn to the second question, that is, whether the purported exercise of the power conferred by clause 18 in and by the deed of 1940 is valid. Counsel for the youngest son submits the trustees did not in fact exercise any power under clause 18 at all. He says the trustees raised nothing, paid nothing, applied nothing. All the trustees did was to declare new trusts concerning certain scheduled investments; they advanced nothing. It was argued that in effect they made no application of any investments, but were really only appointing funds upon a contingency which might or might not arise in the future. The question, it was argued, is not whether the objects of the power, the infant children of Captain Wills, obtain some benefit or advantage but whether funds are applied for their benefit. Counsel referred me to *In re Vestey's Settlement*,[1] where the Court of Appeal held that out-and-out allocations to infants were applications for their benefit, but he points out that Lord Evershed M.R. at the conclusion of his judgment expressly left open the question I have to determine, namely, whether under a power such as I have before me you can create sub-trusts. It was further submitted that if, under a power of advancement, you can in effect alter the trusts or create sub-trusts, a number of the earlier authorities such as *In re May*,[2] and *In re Mewburn's Settlement*,[3] must have been differently decided. It was submitted that these authorities show that in exercising a power of advancement trustees cannot declare new trusts. Those authorities were, however, really considering a different problem, namely, whether in exercising a power of appointment the appointor might properly include a power of

[1] [1951] Ch. 209; [1950] 2 All E.R. 891.

[2] [1926] Ch. 136.

[3] [1934] Ch. 112

advancement, or whether such inclusion infringed the principle delegatus non potest delegare.

On the other hand, there are a number of reported cases in which the court has held that trustees may properly settle funds advanced under a power of advancement. Thus, in *Roper-Curzon* v. *Roper-Curzon* [4] there was power in a marriage settlement to advance to a son of the marriage "for his advancement or preferment in the world." The trustees applied to the court to know whether they might make an advancement to the son, then married and studying for the profession of the law. Lord Romilly M.R. declined to authorize an advancement unless the son settled the funds advanced. In *In re Halsted's Will Trusts* [5] Farwell J. decided that under a power of advancement contained in a will " . . . for his benefit or advancement in life," trustees might settle a sum on an object of the power in order to provide for his wife and children but upon terms that the settlement was limited to benefit him, his wife and children with an ultimate trust for residue of the testator's estate. In *In re Ropner's Settlement Trusts* [6] Harman J. decided that under a power to apply one-quarter of the trust funds "for the advancement preferment or benefit" of beneficiaries, trustees might properly make settlements upon objects of the power, the main reason being a desire to avoid heavy duties on the death of a man aged 58. However, in that case it was conceded by counsel that it was in the power of the trustees to do so. Wynn-Parry J. has, in effect, twice come to a similar conclusion. First in an unreported case of *In re Tetley*,[7] mentioned in *In re Ropner*,[8] and secondly in *In re Meux*.[9] That decision was upon section 53 of the Trustee Act, 1925, but I think it is clear that Wynn-Parry J. would have come to a similar conclusion upon section 32 of the same Act. I have seen the settlement approved by the judge. It was of the simplest kind and as stated in the judgment,[10] it merely excluded the plaintiff's life interest and substituted an estate tail contingent on attaining 21 for a vested estate tail in the first defendant.

These decisions have been fairly criticized by counsel for the youngest child. In none of them, it was submitted, was there any argument upon whether the transaction amounted to a "raising." In *Roper-Curzon* v. *Roper-Curzon* [11] and *Ropner's* case [12] there was no argument on the power of the trustees to apply funds by making a settlement. Again it was argued that *Roper-Curzon* v. *Roper-Curzon* [13] and *In re Halsted* [14] could be explained on the footing that the settlements were made at the request of the object of the power. It was said that it followed

[4] (1871) L.R. 11 Eq. 452.
[5] [1937] 2 All E.R. 570.
[6] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332.
[7] Unreported, Wynn-Parry J., March 31, 1952.
[8] [1956] 1 W.L.R. 902, 905.
[9] [1958] Ch. 154; [1957] 3 W.L.R. 377; [1957] 2 All E.R. 630.
[10] [1958] Ch. 154.
[11] L.R. 11 Eq. 452.
[12] [1956] 1 W.L.R. 902.
[13] L.R. 11 Eq. 452.
[14] [1937] 2 All E.R. 570.

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from *In re Ropner* [15] that trustees could take away property from a beneficiary and that could not be right. It is most certainly true that in none of the cases did the court have the benefit of the able arguments which I have had in this case from Mr. Edwards and Mr. Stamp. Nevertheless, so far as this court is concerned, these authorities do establish the proposition that trustees exercising a power of advancement may make settlements upon objects of the power if the particular circumstances of the case warrant that course as being for the benefit of the object of the power. What the authorities typified by *In re May* [16] and *In re Mewburn* [17] establish to my mind is that any settlement made by way of advancement upon an object of the power by trustees must not conflict with the principle delegatus non potest delegare. Thus, unless upon its proper construction the power of advancement permits delegation of powers and discretions, a settlement created in exercise of the power of advancement cannot in general delegate any powers or discretions, at any rate in relation to beneficial interests, to any trustees or other persons, and in so far as the settlement purports to do so it is pro tanto invalid. I say that without prejudice to the propriety of including an ordinary power of advancement in such a settlement; see *In re Morris*.[18]

I must now consider the circumstances of this particular case to see whether the power of advancement has been properly exercised. When the twins were born in 1940 their father was four months short of his 25th birthday and was serving with the Coldstream Guards in the Middle East. If he failed to attain 25, and there was, of course, a serious risk that he might, the fortunes of his wife and young family would be grievously affected. I cannot doubt for one moment that a substantial out and out allocation to each infant absolutely (as in *In re Vestey* [19]) under the power of advancement would have been fully justified in the particular circumstances of this case in spite of their extreme youth. The trustees quite properly were considering advancing large sums, the scheduled investments in the deed of 1940 being of the value of £200,000. An out and out allocation would, however, have some drawbacks. If one of the twins died in infancy a substantial sum would be payable in estate duty, and the balance would go under the law relating to intestacy, probably to the mother and father or the survivor. The deed of 1940 was an extremely sensible method of overcoming those drawbacks by making the advances take effect contingently on the twins attaining 21. Income would still be available for their maintenance pending vesting. The deed of 1940 was of the simplest kind. It did not attempt to confer any powers or discretions on any persons. It would be very regrettable if some policy of the law authorized an out and out advance but not an advancement on

[15] [1956] 1 W.L.R. 902.
[16] [1926] Ch. 136.
[17] [1934] Ch. 112.
[18] [1951] W.N. 412; [1951] 2 All E.R. 528.
[19] [1951] Ch. 209.

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trusts where the particular circumstances of the case made that method the sensible and practical way of doing it. Ultimately, however, the question to be answered is this: Can this transaction properly be regarded as the raising and payment or application of part of the share of residue to which Captain Wills was then contingently entitled "for the benefit of any child children or "wife" of Captain Wills?

In my judgment, the answer is that it was a raising, because the scheduled investments were "raised" in a broad sense by the trustees not by being realized but by being taken out of the trusts of residue and held on new trusts for the benefit of the twins; that cannot be affected by the circumstance that in certain events the trusts might fail and the scheduled investments fall back into residue. Furthermore it was, in my judgment, an application for the benefit of Captain Wills' two eldest children and not a mere appointment of new trusts. Trustees cannot under the guise of making an advancement create new trusts merely because they think they can devise better trusts than those which the settlor has chosen to declare. They must honestly have in mind some particular circumstances making it right to apply funds for the benefit of an object or objects of the power. Having reached the conclusion that some application is right and proper, it is, in my judgment, a question to be determined in all the circumstances of the case whether the application should be out and out or whether it is desirable to create certain trusts. In this case there was an overwhelming case for an immediate application to protect the twins in case their father should die under 25 and a simple settlement creating contingent interests was the best way of effecting that application. In my judgment, the deed of 1940 was a valid exercise of the power conferred by clause 18, and I shall so declare.

Declarations accordingly.

Solicitors: *Trower, Still & Keeling.*

P. P.

[COURT OF APPEAL.]

C. A.

1958
June 17.

Lord Goddard C.J., Parker L.J. and Lloyd-Jacob J.

UNIVERSAL CARGO CARRIERS CORPORATION *v.* CITATI.

Arbitration—Special case—Findings of fact—Inference of fact—Power of court to draw—Relevant facts found by arbitrator—Inferences of fact not drawn by arbitrator—R.S.C., Ord. 34, *rr.* 1, 7.

C. A.

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Universal Cargo Carriers Corporation v. Citati.

The court has power under R.S.C., Ord. 34, r. 1,[1] to draw inferences of fact from facts found in a special case (including a special case stated on an award made by an arbitrator under section 21 of the Arbitration Act, 1950, for that is a "matter" within rule 7 of Order 34 [1]), provided that such inferences do not conflict with the facts found or inferred by the tribunal of fact.

Williams v. *Manisselian Frères* (1923) 17 Ll.L.Rep. 72 applied.

Where, therefore, a judge, on hearing a special case stated on an award stated by an arbitrator under section 21 of the Arbitration Act, 1950, declined to find a fact which, although it was not found in the case, must be inferred from it, and remitted the case to the arbitrator for a further finding of fact, the judge was in error.

Per Parker L.J. The power to draw inferences must not be used as a convenient method of avoiding the necessity of remitting to an arbitrator. If there is any conceivable doubt as to what the arbitrator would find or what inference he would draw, then the matter must be remitted; but if the inference is irresistible the court can draw its own inference.

Appeal from Devlin J.[2]

By a charterparty dated June 30, 1951, shipowners, Universal Cargo Carriers Corporation, chartered their steamship *Catherine M. Goulandris* to Pedro Citati, to proceed to Basrah and there load a cargo of scrap iron for carriage to Buenos Aires. The vessel arrived at Basrah on July 12, but as there was no cargo ready, no effective shipper nominated, and, accordingly, no loading berth, she remained at the buoys. The lay days were due to expire on July 21, and on July 18, the shipowners, finding that no cargo was yet available or was likely to be available, cancelled the charter, rechartered the vessel to other charterers at a lower rate of freight, and on July 23 the vessel sailed for Bombay to load under the new charter. On July 24 the charterer obtained an injunction in New York against the shipowners, but it was discharged by consent on July 27; and the shipowners, without prejudice to their rights, granted the charterer an option, to be exercised before midnight on August 15–16, 1951, to charter a substitute vessel from them on the same terms. No cargo, however, became available and the option was never exercised.

Thereafter, arbitration proceedings were started, the shipowners claiming damages exceeding $100,000, representing the difference in freight rates, and the charterer counterclaiming for repayment of advance freight, the point in issue being whether the shipowners had been entitled on July 18 to cancel the charter.

[1] R.S.C., Ord. 34, r. 1: "The "parties to any cause or matter may "concur in stating the questions of "law arising therein in the form of "a special case for the opinion of the "court. Every such special case "shall be divided into paragraphs "numbered consecutively, and shall "concisely state such facts and "documents as may be necessary to "enable the court to decide the questions raised thereby . . . and the "court shall be at liberty to draw "from the facts and documents "stated in any such special case any "inference, whether of fact or law, "which might have been drawn there-"from if proved at a trial."

R. 7: "This Order shall apply to "every special case stated in a cause "or matter, or in any proceeding "incidental thereto."

[2] [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.

The owners by their pleadings raised two contentions: (1) that the charterer had shown by his conduct that he did not intend to perform the contract, and that he had committed an anticipatory breach thereof; and (2)—by a later amendment to the points of claim, made before the arbitration began—that the charterer was unable and unwilling at any material time to perform the charterparty, in that when the ship left Basrah it had become clear that no scrap iron was or would be available, and that, accordingly, the adventure had been frustrated.

The hearing before the arbitrator (Mr. Eustace W. Roskill Q.C.) did not take place until February, 1956, and it lasted four days. At the request of the shipowners the arbitrator stated his interim award on liability in the form of a special case, set out at considerable length. He found that the charterer had committed an anticipatory breach of the charterparty, which the owners were entitled to and did treat as repudiation of the charterparty.

By paragraph 33 of the special case the arbitrator made the following further findings of fact: " (1) On July 18, 1951, there was " no person or shipper in Basrah or elsewhere in Iraq who was " prepared to ship any scrap iron on board the vessel, but the " respondent " [the charterer] " was not aware that this was " so; (2) the only person in Iraq who had scrap iron in his posses- " sion or control which could have been used for shipment on " board the vessel was Vassos, and the respondent by July 18, " 1951, was aware that this was so; (3) on July 18, 1951, Vassos " was not prepared to ship any scrap iron on board the vessel: " the respondent on July 18, 1951, was aware that Vassos had " refused so to ship but then hoped that Vassos might relent " and agree thereafter to ship on board the vessel: the respon- " dent was encouraged in this hope by Chbib; (4) Vassos in fact " was not prepared at any time after July 18, 1951, to sell any " scrap iron which he owned or controlled either to the respon- " dent, Haddad or Chbib; but the respondent until about July 23 " or 24, 1951, continued to hope, and was encouraged by Chbib " to hope, that Vassos might relent and agree to ship on board " the vessel; (5) even if Vassos had relented and agreed to ship " on board the vessel, such shipment on board the vessel on and " after July 18, 1951, could only have taken place if the claimants " had been prepared to break the fresh charterparty into which " they had entered on July 18, 1951; there was no evidence " before me from which I can find or infer that the claimants " would have been prepared to do this; (6) even if Vassos had " relented and agreed to ship, such agreement would in all " probability have been conditional upon Vassos receiving a " greatly enhanced price which, together with the freight payable " under the charterparty, would have exceeded the $375,000 for " which the respondent held permission to open and had opened " the letter of credit: I do not think it would necessarily have " been impossible for the respondent to make fresh arrangements " regarding payment both for the goods and for freight, but at

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"best it would have taken a very considerable time indeed for "such fresh arrangements to have been made; (7) the respon- "dent on July 18, 1951, was not able to perform the charterparty; "(8) the respondent on July 18, 1951, was willing to perform the "charterparty if and when cargo became available to load on the "vessel."

The question of law stated for the opinion of the court, namely, whether the shipowners were entitled on July 18, 1951, to treat the charterparty as discharged by the charterer's breach, and to claim damages accordingly, came before Devlin J. in February, 1957. The hearing lasted six days, and counsel for the shipowners submitted, on their second contention as to frustration, that the cumulative effect of the facts found by the arbitrator showed inability to perform on the part of the charterer, but that even if there were no such actual finding, the court had power under R.S.C., Ord. 34, r. 1, to draw such an inference of fact from the facts found in the case.[3] If, however, the court's view was that there was no such power, counsel asked the court to exercise its power under section 22 of the Arbitration Act, 1950, and remit the case to the arbitrator for a further finding of fact on the issue of inability. As that application for remission was out of time, Devlin J. granted it and extended the time only on an undertaking by the shipowners to pay the costs of the remission, unless the court otherwise directed. The order for remission was made on March 12, 1957,[4] at the conclusion of an opinion delivered by the judge in favour of the charterer on the substantive issue of law as to anticipatory breach.

On the issue of inability, the judge said that if the shipowners could establish it on the facts found, they were entitled to succeed; but though the findings of fact in the award contained much material from which such an inference might be made, that inference had not been drawn; and that it was well settled that the court itself was not permitted to draw inferences of fact from facts found by an arbitrator.[5] His Lordship said that the reason why there was no conclusive finding on this point was because it had not been raised before the arbitrator; and that the shipowners were at fault in not having required the arbitrator to find the necessary facts. In making the order that the case be remitted for the arbitrator to answer the question "whether on July 18, "1951, the charterer was willing and able to perform the charter- "party within such time as would not have frustrated the "commercial object of the adventure," his Lordship said that in any event the shipowners must pay the whole costs of the hearing of the special case incurred to date and any costs which might be further incurred as a result of the remission.

The charterer appealed against the order for remission, but the Court of Appeal, on July 25, 1957,[6] upheld the judge's order,

[3] [1957] 2 Q.B. 401, 419.
[4] Ibid. 455.
[5] Ibid. 427.
[6] [1957] 1 W.L.R. 979; [1957] 3 All E.R. 234.

and intimated that in their view the point as to inability had been raised on the pleadings before the arbitrator in such form as to have enabled him to make the necessary findings. The question whether the court itself had power to draw inferences of fact from the facts found in the special case was left open.

On October 4, the arbitrator made a further finding of fact in favour of the shipowners; and the case again came before Devlin J. on October 14, 1957, for final judgment, which was in favour of the shipowners.

The judge was then for the first time referred, by counsel for the shipowners, on the issue as to costs, to the decision of the Court of Appeal in *Williams* v. *Manisselian Frères* [7] as authority for the submission that the court had power to draw inferences of fact from facts found on a special case stated by an arbitrator; and it was submitted that as the judge could have drawn such inferences from this special case and could thereby have avoided the remission, the order for costs of the hearing and of the remission should follow the event and should now be made in favour of the successful shipowners. The judge declined to alter his order as to costs. He said that if the fact found on the remission had been in the case from the beginning the argument before him would have been considerably shortened; that it was the business of a judge to try to save the costs of the parties by shortening matters; and he continued: "The factor that operated on my "mind at the time and operates on it now is that . . . it is the "business of the party who raises a question of law or wishes "to advance a contention of law on the hearing of a case "stated, to see when he gets the award that the facts set out in "it are sufficient to enable him to do so. If they are not, then "he ought to apply at once. . . . Where, as here, the issues are "complicated, and where, as here, the parties have narrowed "the matter down by argument, and are invited by the arbitrator "(as I think they were here) to set out the findings of fact that "they want, it is not, in my judgment, sufficient for one party "to say that there was an issue raised on the pleadings. I do "not think that it is part of the duty of an arbitrator . . . to go "back through the pleadings to see whether there are any points "which have not been expressly and in terms abandoned which "raise issues which were not left to him, or apparently not left "to him, for a finding of fact thereon, and to extend the award "by findings of fact on them. . . ."

The judge declined to alter his reserved opinion of March 12, 1957, in the light of the Court of Appeal decision, and said that the best course on costs would be to allow his original order to stand, namely, that the successful owners should pay the costs of the hearing and of the remission; but he gave leave to appeal against that order. His Lordship also declined to alter his opinion on the question whether the court had power to draw inferences of fact from facts found by an arbitrator in a special case, but

[7] (1923) 17 Ll.L.Rep. 72.

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asked that if that point were not taken to the Court of Appeal he should be informed in order that a note could be put into the report of his judgment in the Law Reports, pointing out, for the convenience of practitioners, that *Williams* v. *Manisselian Frères* [7] had not been considered before him.

The shipowners appealed with leave against the order as to costs, and the charterer cross-appealed. An appeal by the charterer and a cross-appeal by the shipowners on the substantive issues were also set down; but at the hearing the charterer was not represented, and did not appear, and his cross-appeal on costs and the appeal and cross-appeal on the substantive issues were accordingly struck out.

Ashton Roskill Q.C. and *Henry V. Brandon* for the shipowners.

The following cases were cited in the course of argument: *Williams* v. *Manisselian Frères* [8]; *Strathlorne S.S. Co. Ltd.* v. *Andrew Weir & Co.*[9]; *Nello Simoni* v. *A/S M/S Straum* [10]; *Royal Greek Government* v. *Minister of Transport (No. 2)* [11]; *North-Western Cachar Tea Co. Ltd.* v. *British & Benningtons Ltd.*[12]; *Produce Brokers Co.* v. *Weiss & Co.*[13]; *Barclay* v. *Pearson.*[14]

LORD GODDARD C.J. said that this appeal had come down entirely to a question of costs, though it arose in a somewhat complicated case, which had been before the courts on a number of occasions.

[His Lordship stated the facts and the two contentions of law put forward by the shipowners on the arbitration. He continued:] The arbitrator made an award of very considerable length. It may be that if the award had not been as long as it was, some of the trouble might not have arisen, for though I am not criticizing the award, it was very lengthy, and I think it takes a good deal of following. At any rate, the arbitrator held that there had been an anticipatory breach. [His Lordship stated the arbitrator's findings of fact in paragraph 33 of the case stated, and continued:] It was not stated in so many words that the arbitrator so found, but the owners contended that that paragraph amounted to a finding that impossibility had occurred which frustrated the adventure.

[His Lordship then stated the history of the subsequent proceedings before Devlin J. and the Court of Appeal set out above, and continued:] The matter was remitted to the arbitrator. The arbitrator found—and it was quite obvious that he could not have done otherwise—that impossibility had occurred.

[7] (1923) 17 Ll.L.Rep. 72.
[8] Ibid.
[9] (1934) 40 Com.Cas. 168; 50 Ll.L.Rep. 185.
[10] (1949) 83 Ll.L.Rep. 157.
[11] (1949) 66 T.L.R. (Pt. 1) 504; 83 Ll.L.Rep. 228.
[12] (1921) 10 Ll.L.Rep. 381.
[13] (1918) 87 L.J.Q.B. 472.
[14] [1893] 2 Ch. 154.

And, indeed, I think from reading this award, with all respect to the judge, that the arbitrator had all along intended to find that impossibility had occurred. If one reads paragraph 33 of the award, it will be seen that, from the facts which the arbitrator found clearly enough—although he said that "in his view" certain things had occurred—the arbitrator had always taken the view that, by July 18, 1951, there was no scrap iron that could be shipped from Basrah. That is what it comes to.

Now the shipowners, having succeeded in the arbitration, have appealed to this court, by leave of the judge, because the judge, in giving his final decision in their favour, adhered to his view with regard to the costs, namely, that they had to pay the whole of the costs; but he did give leave to appeal. In my opinion, this court cannot support the order of the judge with regard to the costs.

Two points have been taken by Mr. Roskill. The first point was that, on reconsideration, especially if the reasons which had influenced the Court of Appeal were taken into account, the judge should not have made the order that he did. The second point was that the judge was wrong in his view that he had no power to draw an inference of fact. If he had considered that he had that power, he would have drawn the inference of fact and found in exactly the same way as the arbitrator found; and, therefore, there would have been no need to remit the case to the arbitrator. Mr. Roskill so contended before the judge; but the judge made him pay the costs because he applied to remit and he was out of time. The judge said that, as he was applying for an indulgence, he ought to pay all the costs; and Mr. Roskill maintains that the judge was wrong and that he ought to have drawn the inference for himself.

That second contention of Mr. Roskill raises a point of some importance, and I propose to base my decision on that. That relieves me of the necessity of having to consider the question whether or not an appeal would lie on the other ground, since it might be said that that was entirely a matter of discretion for the judge.

I have already pointed out that the arbitrator in paragraph 33 of the stated case found certain facts, from which the judge could and would have drawn the inference that it was impossible to ship the cargo within the material time, if he had thought he had power to do so.

The judge, however, said that it was well settled that he had no power to draw inferences of fact which had not been drawn by the arbitrator. In so saying, he did not cite any authority for that proposition; he laid it down as an indisputable fact. With all respect to the judge, I think he was wrong on that point. No case has ever laid that down; and the cases which were cited to, and no doubt considered by, the judge really turned on a different point, namely, that if an arbitrator has drawn an inference of fact from the matters before him, it is not open to the court on a

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special case to disregard the fact which the arbitrator has inferred and substitute for it a fact which the court has inferred, because that would be differing from the arbitrator's finding of fact. The law is perfectly clear that all facts are for the arbitrator and not for the court.

If, therefore, the arbitrator has found a fact by inference, it is not open to the court by inference to find the contrary fact; but it has never been held in any of the cases to which reference has been made that the court cannot draw an inference of fact if there is what I may call a hiatus; that is to say, where some fact ought to have been found which has not been found, but which the court can see, from the facts which have been found, must be inferred. Indeed, there is authority directly in point, which, curiously enough, is not mentioned in any textbook, but which the industry of Mr. Roskill has found, in *Williams* v. *Manisselian Frères*.[1] In that case Scrutton L.J. drew inferences of fact; he pointed out in his judgment that there was a missing fact and that, although the case had been sent back to an arbitrator, there was still a missing fact; and he proceeded to draw an inference which supplied that omission. He said: "For this "reason"—because something had not been found—"we asked "the arbitrator to say whether the shortage which he found was "commercially substantial, but for some reason or another he "did not answer the question, and his recent and lamented "death prevents us from asking the question now. This court "has power under R.S.C., Ord. 34, r. 1, to draw inferences of "fact from the facts stated; and I draw the inference that to "ship 2,578 tons at the Danube ports, out of a total final cargo "of 5,225 tons, is commercially to ship half the cargo."

That constitutes clear authority that, in the opinion of the Court of Appeal, the court has power to draw inferences of fact, provided, of course, that it does not draw an inference of fact which is in conflict with a fact found, whether by inference or not, by the arbitrator.

Scrutton L.J. in that case referred to and relied on Order 34 of the Rules of the Supreme Court, and rule 1 of that Order provides: "The parties to any cause or matter may concur in "stating the questions of law arising therein in the form of a "special case for the opinion of the court. Every such special "case shall be divided into paragraphs numbered consecutively, "and shall concisely state such facts and documents as may be "necessary to enable the court to decide the questions raised "thereby." Then, after certain provisions, it states "and the "court shall be at liberty to draw from the facts and documents "stated in any such special case any inference, whether of fact "or law, which might have been drawn therefrom if proved at a "trial."

When Mr. Roskill first showed that Order to us, I had some doubt as to whether that would apply to a special case stated

[1] (1923) 17 Ll.L.Rep. 72.

under the Arbitration Act, 1950, because a case stated under section 21 of the Arbitration Act is a case stated by an arbitrator; it is not a case which any parties to a cause or matter have concurred in stating. But rule 7 of Order 34 states: "This Order "shall apply to every special case stated in a cause or matter, "or in any proceeding incidental thereto." Of course, an arbitration is a "matter" and, therefore, it seems clear that the Order does apply to a case stated under the Arbitration Act as well as to a case stated by agreement between the parties; and there is, as I have said, the direct authority of the Court of Appeal in *Williams* v. *Manisselian Frères* [1] that the court has power to draw an inference.

It seems to me, therefore, that the result of all this is that the judge, in declining to draw the inference which he might have drawn, and in thinking that it was necessary to remit the case to the arbitrator for him to find the fact or draw the inference, was in error, and I cannot agree with him. I think that he had power to draw, and should have drawn the inference, because, as I have said, it is quite clear that, if he had considered that he had such power, he would have drawn the inference that there was impossibility here. It was the only inference which could be drawn and, I think, in more than one place in his judgment, the judge was of the opinion that that was the only conclusion which he could have come to.

In these circumstances, the reasons which the judge gave for ordering the successful claimants to pay all the costs go. There was no necessity to remit this case to the arbitrator; there was no necessity for the shipowners to have taken steps within six weeks or any particular time to get the case remitted to the arbitrator. There were plenty of facts found in the case to enable the court to draw the inference, if necessary. Speaking for myself, I think that the arbitrator had found enough facts to make it unnecessary to draw any inference.

Be that as it may, I am clearly of the opinion that the case need never have been referred back to the arbitrator, and it is unfortunate that all these proceedings and expenses have been incurred. The reason on which the judge based his order with regard to the costs has been shown to be erroneous. Accordingly, it should be set aside; the costs must follow the event and, therefore, the shipowners are entitled to costs.

PARKER L.J. I so entirely agree with everything that my Lord has said that I only desire to add one word as a word of caution. This power to draw inferences, in my judgment, undoubtedly exists; but, as my Lord has said, it must not be used to interfere with an inference drawn by the arbitrator in the sense of substituting the court's inference for that of the arbitrator. Also it must not be used as a convenient method of avoiding the

[1] (1923) 17 Ll.L.Rep. 72.

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necessity of remitting to an arbitrator. If there is any conceivable doubt as to what the arbitrator would find or what inference he would draw, then the matter must be remitted; but if, as I think is the case here, the inference is irresistible, then the court can draw its own inference. Accordingly, I would allow this appeal.

LLOYD-JACOB J. I agree.

Appeal allowed.

Solicitors: *Constant & Constant.*

M. M. H.

[HOUSE OF LORDS.]

H. L. (E.)† CADE . . . . . APPELLANT;

AND

BRITISH TRANSPORT COMMISSION . . RESPONDENTS.

1958
May 8, 12, 13; *June* 25.

Railway—Statutory duty—Permanent way men—Man killed on line—"Repairing the permanent way"—Tightening loose fishplate nuts—Whether work of "repairing"—Meaning of "repair"—Meaning of "working"—Whether "danger . . . likely to arise"—Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 *Vict. c.* 27), *s.* 1; *Prevention of Accidents Rules*, 1902 (*S.R. & O.* 1902, *No.* 616), *r.* 9.

Fact or Law—Degree, question of—Statutory duty—Whether "danger "...likely to arise."

Rule 9 of the Prevention of Accidents Rules, 1902, provides: "With the object of protecting men working singly or in gangs "on or near lines of railway in use for traffic for the purpose of "relaying or repairing the permanent way of such lines, the rail-"way companies shall, after the coming into operation of these "rules, in all cases where any danger is likely to arise, provide "persons or apparatus for the purpose of maintaining a good look-"out or for giving warning against any train or engine approaching "such men so working."

The plaintiff's husband, an experienced lengthman in the employment of the defendants, the British Transport Commission, was struck and killed by one or other of two passing goods trains while bending over to begin tightening-up a loose fishplate nut on a railway line of the defendants. It was daylight and there was clear visibility up and down the lines for about a quarter of a mile. The trains were travelling at 15 to 20 miles per hour and the number of trains going each way was an average of two or three an hour. The deceased was working alone and no look-out had been provided. The widow sued the defendants for damages under the Fatal Accidents Acts, 1846–1908, alleging a breach of statutory duty:—

Held, (1) "repair" involved putting right that which had gone wrong, and that the work on which the deceased was engaged was

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† *Present*: VISCOUNT KILMUIR L.C., LORD MORTON OF HENRYTON, LORD COHEN, LORD EVERSHED and LORD BIRKETT.

accordingly "repairing the permanent way," within rule 9 of the rules of 1902.

Dicta in *Berriman* v. *London & North Eastern Railway Co.* [1946] A.C. 278, 294, 307, 314; 62 T.L.R. 170; [1946] 1 All E.R. 255 applied.

Dictum of Donovan J. in *Reilly* v. *British Transport Commission* [1957] 1 W.L.R. 76, 79; [1956] 3 All E.R. 857 approved.

Per Lord Morton. *Semble,* the deceased was "working" on the line "for the purpose of . . . repairing the permanent way" within the meaning of rule 9 from the time when he set off along the line to examine the track for defects.

Judson v. *British Transport Commission* [1954] 1 W.L.R. 585; [1954] 1 All E.R. 624 distinguished.

(2) That the provision for maintaining a look-out and giving warning "in all cases where any danger is likely to arise" did not impose an absolute duty on the respondents; the words "danger "... likely to arise" must be given their ordinary meaning, and in determining whether or not the condition was fulfilled the court was entitled to take into consideration such factors as the site, the amount and speed of traffic, the nature of the work, the visibility—and the experience of the deceased. Though some allowance had to be made for temporary inadvertence and distraction, some assumption must be made as to the behaviour of the man engaged. The question was one of degree and therefore of fact.

Hutchinson v. *London & North Eastern Railway Co.* [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330 distinguished.

(3) (Lord Cohen dissenting) that in all the circumstances danger was not likely to arise and the defendants were not liable.

Decision of the Court of Appeal [1957] 1 W.L.R. 947; [1957] 3 All E.R. 87 affirmed.

APPEAL from the Court of Appeal (Hodson, Parker and Ormerod L.JJ.).

This was an appeal from an order of the Court of Appeal made on July 15, 1957, upholding an order made by Barry J at Leeds Assizes on January 17, 1957, in an action in which the appellant, Phyllis Maud Cade, widow and administratrix of the estate of Laurence Cade, deceased, was plaintiff, and the respondents, the British Transport Commission, were defendants.

The facts are fully stated in the opinion of Viscount Kilmuir L.C.

F. W. Beney Q.C. and *Sir Christopher Cowan* (*Felix Denny* with them) for the appellant.

Marven Everett Q.C., *George Waller Q.C.* and *Alastair Sharp* for the respondents.

The following authorities, besides those referred to in their Lordships' opinions, were cited by counsel: *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[1]; *Carey* v. *Ocean Coal Co. Ltd.*[2]; *Smithwick* v. *National Coal Board*[3]; *Vincent* v. *Southern Railway Co.*[4]; *Ferguson* v. *North British Railway Co.*[5]; *Sumner*

[1] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.
[2] [1938] 1 K.B. 365; 54 T.L.R. 40; [1937] 4 All E.R. 219.
[3] [1950] 2 K.B. 335; 66 T.L.R. (Pt. 2) 173.
[4] [1927] A.C. 430.
[5] 1915 S.C. 566.

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v. *R. L. Priestley Ltd.*[6]; *John Summers & Sons Ltd.* v. *Frost*[7]; *Inglis* v. *John Butterey & Co.*[8]; *Greg* v. *Planque*[9]; *Griffin* v. *London Transport Executive.*[10]

Their Lordships took time for consideration.

VISCOUNT KILMUIR L.C. My Lords, this is an appeal from an order of the Court of Appeal in England (Hodson, Parker and Ormerod L.JJ.), which affirmed a judgment of Barry J. in favour of the respondents.

The appeal raises the question of the meaning of certain words of rule 9 of the Prevention of Accidents Rules, 1902 (S.R. & O., 1902, No. 616), made by the Board of Trade pursuant to section 1 (1) of the Railway Employment (Prevention of Accidents) Act, 1900.

The appellant is the widow and administratrix of the estate of Laurence Cade. She claimed damages in respect of the death of her husband in the following circumstances. At the time of his death the deceased was a sub-ganger lengthman in the employ of the respondents, with some four years' experience of that gang. He was working under the orders of one Winfield, the foreman ganger, on a section of the Alexandra Dock to Stairfoot railway at Hull. The length for which Winfield was responsible included the section of line shown on the agreed plan and photographs. It consisted of two sets of running lines described as a main line to distinguish them from sidings but used by goods trains only. The length was what is called a permissive block, that is to say, a number of trains up to seven might enter the block at the same time. The evidence was that an average of two or three trains passed in each direction during each hour with a maximum of five or six. On the gang starting work on the morning of November 12, 1953, Cade, on the instructions of Winfield, went track walking, which involved examining the track for any defects, putting in keys, tightening bolts and generally dealing with anything that went wrong. He went alone without a look-out man, carrying only a hammer. If he found a fishplate bolt loose it would be his duty to get a spanner to tighten it. If he found only one bolt loose he would go on with his inspection until he came to a lengthman's cabin, but if he found both bolts in a fishplate loose he would go at once to the nearest cabin for a spanner. The type of spanner was heavy with a handle three feet long. Later Winfield met Cade at a lengthman's hut. Cade was carrying a spanner and said: "I am going back to tighten a nut "at Settings Dyke Bridge." A few minutes afterwards two trains passed each other near Settings Bridge travelling in opposite directions at speeds of 20 and 15 miles per hour. The

[6] [1955] 1 W.L.R. 1202; [1955] 3 All E.R. 445.
[7] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.
[8] (1878) L.R. 3 App.Cas. 552.
[9] [1936] 1 K.B. 669.
[10] [1950] 1 All E.R. 716.

engine of each of these trains was proceeding tender first. One drew 16 wagons and the other 50. When the train on the up-line had passed about half the other train, the driver of the up-line train saw Cade swaying from side to side in the six-foot way between the tracks and about level with the middle of the tender in front of that driver's engine. Eventually Cade was found lying diagonally across the six-foot way having been severely injured by being struck by one of the trains, and on the same day he died from his injuries. These injuries were in the left part of his head and were inflicted most probably by the tender of the engine being driven on the up-line. Near where he was found on the six-foot way side of the up-line there was a fishplate both the bolts of which were loose. The accident occurred at about 8.15 a.m. when visibility was good. It was possible to see a train for a quarter of a mile in either direction from the point of the accident.

The appellant, by her statement of claim and at the trial, alleged that the deceased was killed by reason of a breach by the respondents of rule 9 of the said Prevention of Accidents Rules, 1902. The appellant made further allegations of negligence which are no longer material.

Rule 9 is as follows: [His Lordship read the rule, and continued:] The two questions raised were: 1. Whether the work which the deceased was doing was a case where any danger was likely to arise? 2. Whether a lengthman about to tighten or engaged in tightening a loose bolt in a fishplate is a man working for the purpose of repairing the permanent way?

Although the second point, having been decided by Barry J. and the Court of Appeal in favour of the appellant, was in this House raised later in the argument I deal with it first.

It was submitted that, if tightening a nut is "repair," the deceased was not working for the purpose of repair since the evidence did not prove more than that he was bending over in order to commence the tightening. It is unnecessary to say more about this argument, save that I do not accept it; nor is it necessary to deal in detail with the case of *Judson* v. *British Transport Commission* [1] as the facts were very different, but I should wish to hear full argument on the scope and extent of the words "for the purpose of relaying or repairing" before being taken to agree with all the observations in the Court of Appeal on this point.

Secondly, reliance was placed on the reasoning in *Berriman* v. *London & North Eastern Railway Co.*,[2] in which the construction of this rule came before your Lordships' House. The deceased in that case was engaged in oiling the connecting rods and other apparatus by which the points were worked from the signal box. We were reminded that the majority of the House differed from the view of the Court of Appeal that repair means

[1] [1954] 1 W.L.R. 585; [1954] 1 All E.R. 624.

[2] [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.

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or includes maintenance. It is worth noting that before us it was conceded that the two were not mutually exclusive. The majority in *Berriman's* case did not, however, stop there. They went on to say that the word " repair " must be given its ordinary meaning, which was unaffected by the context of rule 9, or the fact that the work in question was on a railway line. That being the approach, I observe that Lord Macmillan said [3]: " Relaying is the major operation of renewing what is so defective " as to be past repair; repairing is the minor operation of making " good remediable defects." Lord Porter used the words [4]: " The " exact meaning of repair is perhaps not easy to define, but it " contains, I think, some suggestion of putting right that which " has gone wrong." While my noble and learned friend, Lord Simonds, put it thus [5]: " I do not doubt that apart from obsolete " usage its meaning in the transitive sense is that which I find " in the first dictionary which comes to my hand, ' to restore to " ' good condition by renewal or replacement of decayed or " ' damaged parts or by refixing of what has given way: to " ' mend.' "

Applying this conception that " repair " involves putting right that which has gone wrong, I believe that tightening a nut which has come loose is within it. It is, indeed, viewed as a virtually conceded point in the speech of Lord Jowitt, who with Lord Wright constituted the minority in that case. Moreover, I agree with the decision and the reasoning of Donovan J. in *Reilly* v. *British Transport Comission.*[6] This view is buttressed in the present case by the rule, which the deceased was obeying, that, when he found that two nuts had worked loose, he had immediately to get a spanner and tighten them. I am therefore of opinion that the respondents fail on the second point.

I now turn to the construction of the words " in all cases " where any danger is likely to arise."

It was agreed before your Lordships that the " danger " to which the rule is directed is danger from trains or engines approaching men, or (as in the present case) a single man, working on or near the railway lines.

If that is the nature of the " danger " of the risk of injury to the men or man, what then is the extent of the commission's obligation? That is the vital question and Mr. Beney rightly emphasized the use of the phrases " in *all* cases " and " any " danger." Giving due emphasis to these phrases, the question which must be asked in every case when men or a man are or is so working, or rather (for the question must be asked and answered in time) going to work, on or near the railway lines is: " Will any risk of injury to them or him be likely to arise from " approaching trains or engines? " Whenever that question is

[3] [1946] A.C. 278, 294.
[4] Ibid. 307.
[5] Ibid., 314.
[6] [1957] 1 W.L.R. 76; [1956] 3 All E.R. 857.

answered properly in the affirmative, then and only then must a look-out man be provided.

If that is a correct expression of the nature of the commission's obligation two consequences seem to me to flow necessarily from it. The first is that the duty of the British Transport Commission is not an unqualified or absolute duty like the duty which might arise, for example, under the Factory Acts legislation. As observed by Lord Greene M.R. in the case of *Hutchinson* v. *London & North Eastern Railway Co.*, the vital words "any "danger is like to arise" mean what they say and must be given their ordinary meaning. They import, inevitably, an estimate of likelihood; not of what might possibly be foreseen, but of what should be expected to occur. The estimate must be made according to ordinary principles of common sense and experience. Therefore, the estimate must be made in the light of all relevant circumstances known at the material time, including the amount and speed of traffic on the line, the visibility allowed by gradients and bends and weather conditions, the nature of the work to be done and also the skill and experience of the men or man about to do it.

Mr. Beney argued that such skill or experience was not a relevant factor or, alternatively, that the judge and the Court of Appeal had given it an inadmissible weight. I do not accept either of these submissions. Though, no doubt, some allowance has to be made for temporary inadvertence and distraction, a fair judgment must make some assumption as to the behaviour of the men or man engaged: and the assumption will, plainly, vary widely with the experience and skill of the individual concerned; this is the second consequence I have in mind. If it were otherwise, and if the estimates must be made on the assumption of maximum foreseeable inadvertence, then the obligation to provide a look-out will arise in every case except those of traffic conditions of an extremely limited character. If that had been the intention of the rule-making authority I cannot think that the rule would have been drawn in its existing form. It would have been a simple matter to impose an obligation always to provide a look-out for men working on or near the lines except only in cases in which, having regard to the small amount or other conditions of traffic, no such look-out should be regarded as reasonably necessary.

It has been of the essence of Mr. Beney's case that in the present case (as in every other like case where an experienced man, himself a sub-ganger, was deputed to do a job of inspection of the line which would occupy half a day) the only proper answer to the essential question, which must have been asked at the beginning of the day, was that a look-out should be provided. In other words, that because of the possibility of tightening operations in regard to the bolts, and the possibility of distraction during the performance of that task, some danger was likely to arise. In my judgment, that is not the fair meaning of the words of the rule.

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It confuses what is possible with what is likely. It must be remembered that in *Hutchinson's* case [7] it was not disputed that there was any danger in the work that the men were carrying out. All that was said was that the danger was not an exceptional danger (see *per* Lord Greene [8]). It will be noted that Goddard L.J. says [9]: " . . . there is no ground for saying that the rule is " to be construed as meaning any unlikely danger. The words " are 'Where any danger is likely to arise.' An abnormal or " unusual danger is not 'likely to arise.' It is difficult to fore- " see. There is no reason for giving to those words any other " than their plain, natural meaning."

As in my view there is in this case no breach of the rule, it is unnecessary for me to consider the observations in that case on what is necessary to constitute contributory negligence.

I see nothing in the ratio decidendi of *Hutchinson's* case [10] contrary to my own conclusion, that the answer in every case must be a matter of degree and therefore of fact. In the present case, the view taken by Mr. Winfield, the responsible officer of the commission, was, as I read his evidence, that in the circumstances no danger was likely to arise. Barry J., who felt sympathy for the plaintiff but who heard the witnesses, came to a like conclusion of fact, and I do not think that he was guilty of misdirection. The three judges of the Court of Appeal confirmed the conclusion of Barry J. I think that this House should be very slow to disturb such unanimity of opinion upon a question of degree and fact. Moreover, I share their opinion and would dismiss the appeal.

Lord Morton of Henryton. My Lords, rule 9 of the Prevention of Accidents Rules, 1902 (S.R. & O. 1902, No. 616) has already been read, and the relevant facts have already been stated by the Lord Chancellor.

The first question arising upon this appeal is whether the deceased man, Cade, was " working for the purpose of repairing " the permanent way " at the relevant time. It was submitted by counsel for the respondents that the tightening of a nut or a bolt is in no case a work of repair, but is a work of maintenance which is performed in order to prevent the need for repair. They further contended that if the work in question was a work of repair, the deceased man was not doing that work at the time of the accident.

My Lords, as to the former argument, this House, in the case of *London & North Eastern Railway Co.* v. *Berriman*,[11] decided that men engaged in oiling and possibly also cleaning the mechanism connecting the signal cabin and the points or signals on the running lines of a railway were not engaged in work of repair. In my view, however, it is clear from the speeches in

[7] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.
[8] [1942] 1 K.B. 481, 484.
[9] Ibid. 488.
[10] [1942] 1 K.B. 481.
[11] [1946] A.C. 278.

that case that if the work in question had been the tightening of bolts which were loose, the decision would have been the other way. For instance, Lord Porter said [12]: "I cannot think that the "ordinary man, if asked whether the deceased man was engaged "in repairing the permanent way when he was brushing down "and oiling the signal wires and point rods, would say that he "was. The exact meaning of 'repair' is perhaps not easy to "define, but it contains, I think, some suggestion of putting "right that which has gone wrong. It does not include the "mere keeping in order by oiling, brushing or cleaning something, "which is otherwise in perfect repair and only requires attention "to prevent the possibility of its going wrong in the future." The precise point arising in the present case was dealt with by Donovan J. in the case of *Reilly* v. *British Transport Commission*,[13] and that learned judge said: "The function of crossing "bolts and nose bolts is to hold tightly together the component "parts of the points at that spot. If by working loose they do "not do this, then the bolts cease to perform their full duty "even though they have worked loose only a little. For their "function is not to work loose at all. Accordingly, when the "bolts are tightened up again the result is that something which "has not been doing its full duty before is now restored to full "duty. I see no difficulty in describing an operation which has "that effect as a repair. Looked at in another way, a crossing "bolt or nose bolt which is loose is a defective unit, even though "it is only a little loose, for it should be tight, and if the defect "is not made good, it may become more pronounced, and serious "results, for example, a derailment of a train, might ensue. To "put right such a defect is, I think, reasonably and properly "called a repair." I entirely agree with these observations.

The latter of the two arguments already mentioned must also be rejected. The learned trial judge, Barry J., took the view on the evidence that at the time when Cade was struck he was bending over to tighten one or other of the nuts by hand and, in my opinion, he was fully justified in so finding. It is, therefore, unnecessary to consider whether or not Cade was "working" on the line "for the purpose of . . . repairing the permanent way" from the time when he set out along the line to do the work allotted to him by the ganger Winfield. I incline to think that he was. I quote the following three questions and answers from Winfield's evidence: "Q. What happened then after you had got "to that hut and, so to speak, signed on?—A. Well, we all, the "gang, set off to work after I told Cade that he would go track-"walking. Q. What does that involve?—A. It involves examining "the track. Q. For what purpose?—A. For any defects, or "putting in keys, tightening up bolts or anything that has gone "wrong."

The present case is, I think, distinguishable from the case of

[12] [1946] A.C. 278, 307.

[13] [1957] 1 W.L.R. 76, 79.

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Judson v. *British Transport Commission*,[14] since the plaintiff in *Judson's* case [14] was not walking along the line for the purpose of putting right anything that was wrong, but merely for the purpose of deciding what lengths of line would be required for the repairing and relaying of the line on a later day. I think, however, that some of the observations of the Court of Appeal as to the scope and extent of the words "for the purpose of relaying or "repairing" may require consideration on some future occasion.

The next question arising in the present case is whether any danger was "likely to arise," within the meaning of rule 9, either when Cade set out upon his morning's work or when he set out to tighten the loose nuts, after meeting the ganger Winfield at the lengthman's hut. These seem to me to be the only times at which the duty of providing a look-out man could possibly arise. I think that the latter time, as well as the former, is material to be considered; it would, no doubt, have been possible for the ganger to say to Cade: "Wait here until I get a look-out man "to accompany you," to return to where the other three men were working and to detail one of them to accompany Cade as a look-out.

In my opinion, however, no danger was "likely to arise," within the meaning of the rule, at either of these times. It was certainly possible that danger might arise, but that is not the test to apply in considering whether or not the respondents were in breach of rule 9. The rule is made "with the object of protecting "men working . . . on or near lines of railway in use for traffic "for the purpose of relaying or repairing the permanent way of "such lines . . . in all cases where any danger is likely to arise." Plainly it is always possible that danger may arise to men so working, but the obligation under the rule is limited to cases where danger is likely to arise; so it is clearly contemplated that there may be cases in which danger is unlikely to arise, even when men are working on or near lines of railway in use for traffic for the purpose mentioned in the rule. In considering whether danger was or was not "likely to arise" in the present case, it is, in my view, proper to take into consideration such factors as—

(a) The site of the accident.—The accident occurred upon a curve of a line on a radius of 20 chains, and Winfield gave evidence that the lines were in view for a quarter of a mile in both directions from the point where the accident occurred.

(b) The amount and speed of traffic upon the lines.—The lines, although technically known as a main line, were used for goods traffic only. Winfield and the assistant district operating superintendent employed by the respondents both said that the trains travelled at irregular intervals and not in accordance with any time-table, but at an average of about two to three per hour in each direction. Winfield stated that the speed of one of the two trains involved in the accident was 20 miles per hour, and it was stated by witnesses called by the respondents (whose

[14] [1954] 1 W.L.R. 585.

evidence was not challenged in this respect) that the speed of the other train was about 15 miles per hour.

(c) The nature of the work.—Winfield and another witness, Miller, stated that the work was simple and did not require much attention. Winfield stated that it was possible to place the spanner on the nut and then to turn it while glancing along the track and while keeping a look-out for traffic.

(d) The experience of the deceased.—It was proved and accepted by the appellant, that the deceased was a qualified look-out man and that he was familiar with the rules contained in the British Railways' Rule Book; and Winfield stated that the deceased had been a member of his gang for about four years, that he was familiar with this length of line, and that he had been appointed a sub-ganger in October, 1953.

(e) Winfield stated that visibility was good on the morning in question.

These being the relevant circumstances, I agree with the learned judge and the Court of Appeal that in the present case danger was unlikely to arise, and that there was no breach of rule 9.

I should add that counsel for the appellant contended that it was not right to take into account the fact that the deceased man was an experienced man who was likely to keep a good look-out, and they relied upon certain observations of Lord Greene M.R. and Goddard L.J. in *Hutchinson* v. *London & North Eastern Railway Co.*[15] On this aspect of the matter I cannot usefully add anything to the view expressed by the Lord Chancellor, with which I respectfully agree.

I agree that this appeal should be dismissed.

LORD COHEN. My Lords, I have had an opportunity of reading in print the speech which has been delivered by the noble and learned Lord Chancellor.

I am in complete agreement with his statement of the law applicable to the case. I accept that the duty of the respondents is not an unqualified or absolute duty, and that the words "any "danger is likely to arise" import an estimate of likelihood; not of what might possibly be foreseen, but of what should be expected to occur. I agree also with his statement that the estimate must be made in the light of all relevant circumstances known at the time. I have, however, the misfortune to differ from him as to the proper conclusion to be drawn from those circumstances in the present case. Since the rest of your Lordships, as well as the learned judges in the courts below, agree with the estimate drawn by the noble and learned Lord Chancellor, I can have no great confidence in my conclusion, and I shall not detain your Lordships long in giving my reasons for my view of the facts.

In my opinion, on the facts as found by the learned trial

[15] [1942] 1 K.B. 481.

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judge and summarized by the noble and learned Lord Chancellor, it was likely that two trains would from time to time be passing one another at the point where this accident happened, that on some occasion when this occurred a ganger might be engaged in tightening loose bolts of a fishplate, and that if he were so engaged his attention might be distracted to such an extent that he would fail to observe an approaching train. That being so, it seems to me to be irrelevant that the concurrence of those factors might not often occur, and I should have held that this was a case where danger was likely to arise. For those reasons I would have allowed the appeal.

Lord Evershed. My Lords, I agree with the opinion of my noble and learned friend on the Woolsack, and have nothing to add to it.

Lord Birkett. My Lords, I agree with the opinion of my noble and learned friend on the Woolsack. It covers so completely anything I might wish to have said that I do not desire to deliver an opinion of my own.

Appeal dismissed.

Solicitors: *Smith & Hudson for Williamson, Stephenson & Hepton, Hull; M. H. B. Gilmour.*

F. C.

[COURT OF APPEAL.]

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[1955 W. No. 74.]

Negligence—Standard of care—Do it yourself repairs—Injury to invitee from insecure door handle—Handle fixed by occupier—Degree of care and skill required of householder doing home repairs.
Licensor and Licensee—Invitee or licensee—Duty of occupier.

The plaintiff, a fishmonger, when delivering some fish at the house of the defendant, was invited to come inside and take a cup of tea. When leaving he pulled the back door to; the handle came off in his hand, and he fell about four feet from an unrailed platform and sustained injury. The door was naturally stiff, and was rendered more so by a strong wind.

The handle in question had been fixed by the defendant, an amateur carpenter of some experience, some months before. The handle came away because the anchorage afforded by the three-quarter inch screws fixing it was not strong enough to withstand the force of the pull which the plaintiff found it necessary to exert. The defendant had believed the screws to be adequate for the purpose of fixing the handle. In an action for damages for personal injuries, it was contended for the plaintiff that the screws used by the defendant were too small, and that one inch screws should have been used. The plaintiff claimed damages from the defendant

on the grounds (1) that he was in breach of his duty as invitor to the plaintiff as invitee; (2) that irrespective of that relationship the defendant, in carrying out the work of fixing the handle himself, assumed a duty towards the plaintiff as a lawful visitor to the house to take reasonable care to protect him against any danger created by the insecurity of the handle. Stable J. dismissed the action. On appeal:—

Held, dismissing the appeal, (1) that on either ground of action the duty owed by the defendant to the plaintiff was a duty to take reasonable care for his safety.

(2) That, in the case of such a trifling domestic replacement, a man of the defendant's experience was justified in undertaking it himself.

(3) That the degree of care and skill required of a householder undertaking his own repairs was to be measured not by reference to his own degree of personal competence, but by reference to the degree of care and skill which a reasonably skilled carpenter might be expected to apply to the work in question.

(4) That, since the defendant, a reasonably competent carpenter, was doing his best to make the handle secure, he must be taken to have discharged his duty of care unless his belief that three-quarter inch screws would be adequate was one which no reasonably competent carpenter could reasonably entertain.

Per curiam. The decision did not mean that the degree of skill and care required of an invitor such as the defendant was to be measured by the contractual obligations as to the quality of his work assumed by a professional carpenter working for reward, which was of a higher standard.

APPEAL from Stable J., sitting at Sussex Assizes.

The facts are stated in the judgment.

Alan Fletcher for the plaintiff.

T. Springer for the defendant.

The following cases, which were cited in argument, are not referred to in the judgment: *Bolton* v. *Stone* [1]; *Thurogood* v. *Van den Berghs & Jurgens Ltd.* [2]; *Jones* v. *Bird* [3]; *Blyth* v. *Birmingham Waterworks Co.* [4]; *Bourhill* v. *Young* [5]; *Staveley Iron & Chemical Co. Ltd.* v. *Jones.* [6]

Cur. adv. vult.

May 5. JENKINS L.J. The judgment which I am about to read is the judgment of the court in this case.

This is an appeal by the plaintiff in the action, Albert Ernest Wells, from a judgment of Stable J. dated July 18, 1957, dismissing his claim against the defendant, Frederick Albert Cooper, for damages for personal injuries sustained by the plaintiff when leaving the defendant's house by the back door. The defendant's house, of which he is owner-occupier, is known as "Hazelgarth,"

[1] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.
[2] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.
[3] (1822) 5 B. & Ald. 837.
[4] (1856) 11 Ex. 781.
[5] [1943] A.C. 92; [1942] 2 All E.R. 396.
[6] [1956] A.C. 627; [1956] 2 W.L.R. 479; [1956] 1 All E.R. 403.

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Friars Hill, Guestling, near Hastings. The plaintiff is a fishmonger who had been for some time in the habit of calling at the defendant's house for orders twice weekly. He made one of these customary calls on December 4, 1954, was given an order, went to fetch it from his van, came back with it to the defendant's kitchen, and was then invited to stay for a cup of tea. Having had his tea, he was making his way out by the back door when the handle on which he was pulling to shut the door after him came away in his hand, with the result that he lost his balance, fell to the ground from a raised concrete platform immediately outside the door, and was injured. The question in the appeal is whether, on the facts of the case, the defendant should have been held liable to the plaintiff for this mishap.

The concrete platform on which the door opens is reached from the ground by a flight of steps built against the wall of the house to one side of the door, and is 4 ft. 6 ins. in length measured outwards from the door, by 3 ft. 6 ins. in width. It is raised 4 ft. 1 in. from the ground, and not provided with any railing or fence. The door, which opens inwards, is divided horizontally into two leaves after the manner of a stable door. The handle to which this case relates was attached to the bottom corner of the upper leaf, which overlaps the top edge of the lower leaf on the inside, so that in the process of closing the door the upper leaf draws the lower one along with it. The door is, or was at the material time, fitted with an "atomic strip" which made it more difficult to close than it would otherwise have been, and a fairly stiff pull was necessary to shut it properly. On the day of the accident a very strong wind was blowing against the door which made it even stiffer than usual.

The handle in use at the time of the accident had been attached to the door some four or five months previously by the defendant himself, to replace a bakelite handle which the defendant had decided to discard after a similar bakelite handle on a neighbour's door had broken in his hand. This new handle was made of metal and was of the lever type, mounted in a metal plate attached to the door by four screws inserted through holes, one at each corner of the plate, and screwed into the woodwork of the door. The screws used by the defendant for this purpose were three-quarter inch screws.

It is not in dispute that the handle came away in the plaintiff's hand because the anchorage afforded by these screws was not strong enough to withstand the force of the pull which the plaintiff found it necessary to exert on the handle in order to shut the door after him.

The defendant is an amateur carpenter of some experience, well accustomed to doing small jobs of replacement and repair about his house, and there is no doubt that he believed that his fixing of the new handle was perfectly secure, and that he was making a decided improvement on the former bakelite handle. The adequacy of his work was to all appearance proved by the

fact that during the four or five months which had elapsed between the fixing of the new handle and the time of the accident the new handle had been in constant use without showing any signs of looseness or insecurity.

The relationship subsisting between the defendant and the plaintiff at the time of the accident was admittedly that of invitor and invitee. In these circumstances it is sought to make the defendant liable for the accident on two grounds. First, it is said that the defendant was in breach of his duty as invitor to the plaintiff as invitee. The insecure handle was an unusual danger of which the defendant knew or ought to have known and against which he should consequently have taken reasonable care to guard the plaintiff. Secondly, it is said that in carrying out the work of fixing the handle himself the defendant, irrespective of the invitor-invitee relationship, assumed a duty towards the plaintiff as a lawful visitor to the house to take reasonable care to protect him against any danger created by the insecurity of the handle. See *Riden* v. *A. C. Billings & Sons Ltd.*,[1] Court of Appeal, and in the House of Lords.[2]

We should have thought that in the circumstances of this case the first of these two possible grounds of liability is the more appropriate. But in truth there is little difference between them for the present purpose. Either way the duty owed by the defendant to the plaintiff was a duty to take reasonable care for his safety, and the question is whether on the facts of this case the defendant did take reasonable care to that end.

Mr. Fletcher, for the plaintiff, formulates the issues (in effect) in this way: First, ought the defendant to have foreseen that if the handle came away when a person pulled it to shut the door as the plaintiff did that person might suffer injury; and secondly, if so, ought the defendant to have known that the screws which he used were not adequate to fix the handle to the door firmly enough to prevent any likelihood of such an occurrence?

We think that if the defendant had envisaged the possibility of the handle coming off in the hand of a person pulling on it he could hardly have failed to appreciate the likelihood of untoward consequences such as did in fact occur; and accordingly Mr. Fletcher's second issue appears to us to be the substantial issue in the case. It involves consideration of the standard of care to be demanded of the defendant in relation to the fixing of the handle.

As above related, the defendant did the work himself. We do not think the mere fact that he did it himself instead of employing a professional carpenter to do it constituted a breach of his duty of care. No doubt some kinds of work involve such highly specialized skill and knowledge, and create such serious dangers if not properly done, that an ordinary occupier owing a duty of

[1] [1957] 1 Q.B. 46; [1956] 3 W.L.R. 704.

[2] Sub nom. *A. C. Billings & Sons Ltd.* v. *Riden* [1957] 3 W.L.R. 496; [1957] 3 All E.R. 1.

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care to others in regard to the safety of premises would fail in that duty if he undertook such work himself instead of employing experts to do it for him. See *Haseldine* v. *C. A. Daw & Son Ltd.*, *per* Scott L.J.[3] But the work here in question was not of that order. It was a trifling domestic replacement well within the competence of a householder accustomed to doing small carpentering jobs about his home, and of a kind which must be done every day by hundreds of householders up and down the country.

Accordingly, we think that the defendant did nothing unreasonable in undertaking the work himself. But it behoved him, if he was to discharge his duty of care to persons such as the plaintiff, to do the work with reasonable care and skill, and we think the degree of care and skill required of him must be measured not by reference to the degree of competence in such matters which he personally happened to possess, but by reference to the degree of care and skill which a reasonably competent carpenter might be expected to apply to the work in question. Otherwise, the extent of the protection that an invitee could claim in relation to work done by the invitor himself would vary according to the capacity of the invitor, who could free himself from liability merely by showing that he had done the best of which he was capable, however good, bad or indifferent that best might be.

Accordingly, we think the standard of care and skill to be demanded of the defendant in order to discharge his duty of care to the plaintiff in the fixing of the new handle in the present case must be the degree of care and skill to be expected of a reasonably competent carpenter doing the work in question. This does not mean that the degree of care and skill required is to be measured by reference to the contractual obligations as to the quality of his work assumed by a professional carpenter working for reward, which would, in our view, set the standard too high. The question is simply what steps would a reasonably competent carpenter wishing to fix a handle such as this securely to a door such as this have taken with a view to achieving that object.

In fact the only complaint made by the plaintiff in regard to the way in which the defendant fixed the new handle is that three-quarter inch screws were inadequate and that one inch screws should have been used. The question may, therefore, be stated more narrowly as being whether a reasonably competent carpenter fixing this handle would have appreciated that three-quarter inch screws such as those used by the defendant would not be adequate to fix it securely and would accordingly have used one inch screws instead.

The judge saw and heard two expert witnesses called on the plaintiff's side, namely, one Hicks, an architect and surveyor, and one Hall, a builder; and a great deal depends on the value properly attributable to their evidence.

[3] [1941] 2 K.B. 343, 356; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[His Lordship read passages from the evidence and continued:] The evidence of these two witnesses, if accepted at its face value, would plainly support the view that any reasonably competent carpenter would have appreciated that three-quarter inch screws would not be adequate for the purpose in view, though we think that Hicks's evidence is to some extent weakened by his statement to the effect that three-quarter inch screws would be "adequate" but would allow "absolutely no margin "at all" and also by the sweeping character of his statement to the effect that "the reaction of a person of average intelligence—"such as the defendant, who was in the habit of doing household "carpentry—would be that that screw is of insufficient size to "hold this handle on to the door." Hall, more convincingly, confined his evidence to the length of screw that would have been used by himself or by one of the fully skilled carpenters in his employment. But it is, as we think, to some extent weakened by his last answer in examination in chief, in which he pointed out (in effect) that the three-quarter inch screws might give a firmer hold on perfectly dry and sound wood such as that used for the experiment than they would on a back door exposed to the weather and therefore possibly containing some moisture. This suggests that the firmness of the handle might depend not simply on the length of the screw but also on a less obvious factor relating to the condition of the wood.

Nevertheless, if the judge was to be taken as having accepted the evidence of these two witnesses (particularly that of Hicks) at its face value, it would be difficult to support his conclusion to the effect that the defendant had discharged his duty of reasonable care. But we do not think that the judge did accept this.

[His Lordship read passages from the judgment and continued:] It follows, if we are right in our understanding of the language used by the judge, that he must be taken to have rejected the evidence of the two experts to the effect that any reasonably competent carpenter would or ought to have foreseen that the three-quarter inch screws would prove inadequate, as being in the nature of wisdom after the event. It was for the judge to assess the value of the expert evidence. He appears to us to have assessed it as valueless for the purpose of establishing that the defendant, if he had exercised reasonable care and skill in the matter, would or ought to have appreciated, at the time when he did the work, that the three-quarter inch screws would prove inadequate; and on that assessment of this evidence we think he was well warranted in dismissing the action.

In relation to a trifling and perfectly simple operation such as the fixing of the new handle we think that the defendant's experience of domestic carpentry is sufficient to justify his inclusion in the category of reasonably competent carpenters. The matter then stands thus. The defendant, a reasonably competent carpenter, used three-quarter inch screws, believing them to be adequate for the purpose of fixing the handle. There is no doubt

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that he was doing his best to make the handle secure and believed that he had done so. Accordingly, he must be taken to have discharged his duty of reasonable care, unless the belief that three-quarter inch screws would be adequate was one which no reasonably competent carpenter could reasonably entertain, or in other words an obvious blunder which should at once have been apparent to him as a reasonably competent carpenter. The evidence adduced on the plaintiff's side failed, in the judge's view, to make that out. He saw and heard the witnesses, and had demonstrated to him the strength of attachment provided by three-quarter inch screws. We see no sufficient reason for differing from his conclusion. Indeed, the fact that the handle remained secure during the period of four or five months between the time it was fixed and the date of the accident, although no doubt in constant use throughout that period, makes it very difficult to accept the view that the inadequacy of the three-quarter inch screws should have been obvious to the defendant at the time when he decided to use them.

Mr. Fletcher argued that if the defendant had employed a professional carpenter as an independent contractor to fix the new handle, and the carpenter had used three-quarter inch screws with the same results, the defendant would have been liable to the plaintiff for the carpenter's negligence on the principle enunciated in *Thomson* v. *Cremin* [4] to the effect that the duty of care owed by an invitor to an invitee is personal to the invitor, who cannot escape liability by delegating the performance of his duty of care to an independent contractor. Accordingly, in Mr. Fletcher's submission the defendant must be liable here because it cannot be that the standard of care to be required of an invitor who does the relevant work himself is lower than it would have been if he had employed an independent contractor to do it for him.

We think the fallacy in this argument is that the standard of care is no more than reasonable care, whether an independent contractor is employed or not. The invitor is to take reasonable care and the standard required of him is not raised to anything higher than that by the circumstances that he may choose to employ an independent contractor to do the work for him. As we have said before, it does not follow that because the degree of care and skill exercised by the independent contractor falls short of the standard required of him under his contract with the invitor it also falls short of the standard required of the invitor as between himself and his invitee. The two standards are by no means necessarily the same.

Each case of this kind depends on its own particular facts, to which the broad principle of reasonable care must be applied with common sense. The task of finding the facts and applying the principle to them is eminently a matter for the court of first instance. On the facts of this case, we find it impossible to hold

[4] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

that the judge came to a wrong conclusion, having regard in particular to the view which he took, and was entitled to take, of the expert evidence on the strength of which it was sought, after the event, to show that the defendant knew or ought to have known at the time when he fixed the handle that the three-quarter inch screws were inadequate, notwithstanding that they in fact sufficed to hold the handle securely for the four or five months of constant use which preceded the accident.

Accordingly, we would dismiss this appeal.

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Appeal dismissed.

Solicitors: *Collyer-Bristow & Co. for Elliott & Gill, Hastings; Berrymans.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

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Agriculture — Agricultural marketing — Potato — Whether power to "enter and inspect" land includes power to measure—Whether power improperly exercised—Demand for information about potatoes and total arable acreage of farm—Whether demand, if partly bad, severable—Agricultural Marketing Act, 1931 (21 *&* 22 *Geo.* 5, *c.* 42), *s.* 5 (*g*) (*h*)*—Agricultural Marketing Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 38), *ss.* 5 (1) (*a*), 8*—Potato Marketing Scheme (Approval) Order,* 1955 (*S.I.* 1955, *No.* 690), *paras.* 81, 82, 83.

Agriculture—Disciplinary committee—Special case—Application of Arbitration Acts—Whether court has power to remit award—Chairman of committee—Whether paid chairman an "independent person"—Agricultural Marketing Act, 1949, *ss.* 5 (1) (*a*), 8*—Potato Marketing Scheme (Approval) Order,* 1955, *para.* 83*—Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 22.

Tribunal—Statutory—"Independent person" as chairman—Barrister chairman of disciplinary committee of agricultural marketing board —Paid fee by board—Whether independant.

Statutory Power—Exercise—Mala fides—Onus of proof.

Statutory Power — Exercise — Demand ultra vires — Good in part — Whether severable.

Severability of Documents.

Meaning of "as if"—Agricultural Marketing Act, 1949, *s.* 8*—Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 22.

Pursuant to the provisions of the Agricultural Marketing Acts, 1931 to 1949,[1] the Potato Marketing Scheme (Approval) Order,

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Agricultural Marketing Act, 1931, s. 5: "Subject to the approval "of the Minister, a scheme may pro- "vide for all or any of the matters "set out in one or more of the follow- "ing paragraphs, that is to say:— ". . . (*g*) for empowering any person "authorized in writing by the board, "for the purpose of securing com- "pliance with the scheme, to enter "and inspect, at any reasonable time "and on production of his authority, "any part of the land or premises "occupied by any registered producer

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1955,[2] set up a potato marketing scheme, under which M. was registered with the Potato Marketing Board as a registered producer. In 1957 he grew potatoes at his farm in Kent, but by September 20, 1957, had failed to inform the board of the acreage

" (being a producer specified in the " authority) which the person so " authorized has reason to believe is " used for producing the regulated " product or for doing any of the " following things which is regulated " by the scheme, that is to say, " grading, marking, packing, or " storing the regulated product or " adapting it for sale; (*h*) for requir- " ing registered producers to furnish " to the board such estimates, " returns, accounts and other informa- " tion relating to the regulated pro- " duct as the board consider " necessary for the operation of the " scheme; . . ."

S. 6: " (1) Every scheme shall " provide for the following matters, " that is to say:— . . . (*d*) for " securing that any producer who is " aggrieved by any act or omission " of the board may refer the matter " to one or more arbitrators appointed " in such manner as may be provided " by the scheme, and for the manner " in which any such reference is to " be heard and determined."

Agricultural Marketing Act, 1949, s. 5: " (1) Every scheme under the " principal Act shall, notwithstand- " ing anything in that Act, be so " framed as to secure—(*a*) that there " is a committee of the board, to be " known as the disciplinary commit- " tee, constituted, at each sitting " thereof, of not less than four nor " more than six members of the board " and a chairman, who is not a " member of the board but is an " independent person who is a bar- " rister of not less than seven years' " standing, an advocate of not less " than seven years' standing or a " solicitor of not less than seven " years' standing and is approved by " the Minister."

S. 8: " Section 12 of the Arbitra- " tion Act, 1889, and section 10 of " the Arbitration Act, 1934, . . . and " section 9 of the Arbitration Act, " 1934, . . . shall apply in relation " to the hearing and determining of " the matters which by virtue of " any of the preceding provisions of " this Act are referred to the discip- " linary committee of a board, and " in relation to the enforcement of " the decisions of that committee, as " if the proceedings were an arbitra- " tion under a submission to which " the board and the producer were " parties and as if the disciplinary " committee were the arbitrator or " umpire under the submission."

[2] Potato Marketing Scheme (Approval) Order, 1955, para. 81: " (1) " The board may, whenever they " consider it necessary for the opera- " tion of this scheme so to do, serve " on any registered producer a " demand in writing requiring him to " furnish to them such estimates, " returns and other information " relating to potatoes as may be " specified in the demand."

Para. 82: " (1) Any person autho- " rized in writing by the board may " for the purpose of securing com- " pliance with this scheme, enter and " inspect at any reasonable time and " on production of his authority any " part of the land or premises occu- " pied by a registered producer (being " a producer specified in the authority) " which the person so authorized has " reason to believe is used for pro- " ducing potatoes or for doing either " of the following things which is for " the time being regulated under the " scheme, that is to say, packing and " storing potatoes."

Para. 83: " (1) (*a*) If any " registered producer fails without " reasonable excuse to comply with " any demand or requirement made " by the board in pursuance of " paragraph 81 of this scheme, or if " he knowingly or recklessly makes " any false statement in complying " therewith, or if he obstructs or " interferes with any person duly " authorized by the board under para- " graph 82 (1) of this scheme, the " disciplinary committee hereinafter " described shall impose upon him " and the board shall recover from " him, such monetary penalty not " exceeding £200 as that committee " think just. . . . (2) (*a*) There shall " be a committee of the board, to be " known as the disciplinary commit- " tee, constituted, at each sitting " thereof, of not less than four nor " more than six members of the " board and a chairman who is not a " member of the board but is an " independent person who is a bar- " rister of not less than seven years' " standing, an advocate of not less " than seven years' standing, or a " solicitor of not less than seven " years' standing and is approved by " the Minister."

of potatoes planted by him at his Kent farm in 1957. On September 26, 1957, four persons were sent by the board to measure the acreage of potatoes on M.'s farm, but M. removed and threw aside two measuring poles that had been placed in the ground, and refused to permit the use of a measuring chain, so that the attempt to measure his land proved abortive. On October 3, 1957, a demand in writing was served by the board on M. requiring him to inform them of the acreage of each variety of potato, the acreage of all the potatoes, and the total arable acreage of the farm. M. failed to comply with the demand.

M. was charged before the disciplinary committee of the board with obstruction of the board's officers in their attempt to measure his land, and with failure, without reasonable excuse, to comply with the demand served on him. The chairman of the committee was a barrister of more than seven years' standing and was paid by the board a fee for his services. The committee found the charges proved and fined M. £50 and £20 respectively in respect of each of the charges:—

Held, (1) that the power under paragraph 82 (1) of the scheme to "enter and inspect" land was wide enough to permit ordinary measurement of the land.

(2) That the burden of proving bad faith was on the person asserting it, and M. had failed to prove that the attempt to measure was not a proper exercise of the power given by paragraph 82 (1), or that that power was used other than for the purpose of securing compliance with the scheme.

Barber v. *Manchester Regional Hospital Board* [1958] 1 W.L.R. 181; [1958] 1 All E.R. 322 applied.

(3) That the composite demand served on October 3 was partly bad in so far as it required information about total arable acreage of the farm, which could not be information "relating to potatoes" within paragraph 81 (1), but the demand was nevertheless valid since the bad part could be severed from the good.

(4) That the chairman was "an independent person" within paragraph 83 of the scheme, notwithstanding he was paid for his services by the board, since "independent," in the context in which it appeared, did not refer to financial independence, but to the detached and dispassionate nature of someone unconnected with the industry; accordingly, the committee had been properly constituted.

(5) That the court had no power to remit the award to the committee for further consideration; a special case under the Agricultural Marketing Act, 1949, section 8, did not give the court the powers of remission contained in section 22 of the Arbitration Act, 1950.

SPECIAL CASE stated by Disciplinary Committee of the Potato Marketing Board, pursuant to section 8 of the Agricultural Marketing Act, 1949.

Jack Merricks (referred to in the special case as "the respondent"), a registered potato producer under the Potato Marketing Scheme set up by the Potato Marketing Scheme (Approval) Order, 1955, was charged before a disciplinary committee of the Potato Marketing Board with the following offences under the scheme: (1) that on September 26, 1957, at Lodgeland Farm, Ruckinge, near Ashford, Kent, he obstructed persons duly authorized by the board under paragraph 82 (1) of the scheme, contrary to paragraph 83 (1) (*a*) thereof; (2) that he failed without reasonable excuse to comply with a demand in

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writing served on him by the board on or about October 3, 1957, requiring him to furnish to the board information relating to potatoes planted in 1956 and 1957, contrary to paragraph 83 (1) (*a*) of the scheme.

The committee, the chairman of which was Mr. J. P. Stimson, a barrister of over seven years' standing, stated their award in the form of a special case, and found the following facts: At all material times "the respondent" was registered under the scheme. In 1957 he grew potatoes on land occupied by him at Lodgeland Farm, Ruckinge, near Ashford, Kent. In 1957 each registered producer of potatoes was liable to contribute to the funds of the board the sum of £1 for each acre planted by him with potatoes in that year. On September 26, 1957, the respondent had not informed the board of the acreage of potatoes planted by him in the year 1957 at Lodgeland Farm. On September 26, 1957, four persons authorized by the board in writing entered upon Lodgeland Farm and attempted by means of the ordinary instruments for the measurement of land, to measure the acreage of Lodgeland Farm then used for producing potatoes. The respondent obstructed the above persons or some of them by removing and throwing aside two measuring poles which had been placed in the ground and by refusing to permit the use of a measuring chain. The committee found by inference that the attempt to measure was made for the purpose of securing compliance with the scheme.

On October 3, 1957, the board served on the respondent a demand in writing requiring him to furnish the board with information relating to potatoes grown by him on land occupied by him in Kent and on land occupied by him in Sussex during each of the years 1956 and 1957. He refused to comply with the demand, there was no reasonable excuse for such non-compliance, and by reason of his non-compliance the board suffered loss in the sum of £25. The committee found by inference that on October 3, 1957, the board considered it necessary for the operation of the scheme to serve the above demand upon the respondent.

None of the members of the committee had at any material time played any part in the events giving rise to the charges.

It was contended for the respondent that the committee had no jurisdiction to hear and determine the charge brought against the respondent because the scheme was invalid in that it empowered the board to exercise control over the production of potatoes and to discriminate financially between one registered producer and another, and was accordingly beyond the powers conferred by the Agricultural Marketing Acts, 1931 to 1949; and/or that the committee was not constituted in accordance with paragraph 83 (2) (*a*) of the scheme in that the chairman received a fee from the board for his services and was therefore not an independent person as required by the paragraph. It was further contended that paragraph 82 (1) of the scheme did not confer a power to measure land of a registered producer used for producing

potatoes, or, alternatively, if it did, the power was discretionary and that on the evidence the board attempted to use it for an improper purpose, namely as a test of strength rather than for the purpose of securing compliance with the scheme; that there was no evidence on which the committee could find that the attempt to measure on September 26, 1957, was for the purpose of securing compliance with the scheme. That the demand in writing served on the respondent on October 3, 1957, was invalid in that it required the respondent to supply information to which the board was not entitled, and information which was already known to the board and was in any event of no value to the board and/or information in a form to which the board was not entitled and that the demand exceeded the powers conferred on the board by paragraph 81 (1) of the scheme; and further or alternatively that for these reasons the respondent had reasonable cause for not complying with the demand; and that there was no evidence on which the committee could find that the board considered it necessary for the operation of the scheme to serve on the respondent the above demand in writing.

The questions for the decision of the court were: (1) whether the committee had jurisdiction to hear and determine the charge; (2) whether paragraph 82 (1) of the scheme conferred a power to measure the land of a registered producer used for producing potatoes; (3) whether, if it did, the attempt to measure in this instance was a proper exercise of the power; (4) whether there was any evidence on which the committee could find that the persons who attempted on September 26, 1957, to measure the respondent's land, were so doing for the purpose of securing compliance with the scheme; (5) whether the demand in writing served on the respondent on October 3, 1957, was valid; (6) whether the committee were entitled to find that the respondent had no reasonable cause for not complying with the demand; and (7) whether there was any evidence on which the committee could find that on October 3, 1957, the board considered it necessary for the operation of the scheme to serve on the respondent the aforesaid demand in writing.

Subject to the opinion of the court, the committee found each of the charges proved and imposed on the respondent in respect of the first charge a penalty of £50 and in respect of the second charge a penalty of £20, and further ordered the respondent to pay to the board £25 as the sum which justly represented the loss to the board by reason of his contravention of the scheme.

Ian Percival and *Michael Thomas* for the Respondent.
B. J. M. MacKenna Q.C. and *R. I. Threlfall* for the board.

The following cases were cited in argument in addition to the cases referred to in the judgment: *Ex parte Ringer*[3]; *In re Balaghât Gold Mining Co. Ltd.*[4]; *Pannell* v. *City of London*

[3] (1909) 25 T.L.R. 718.

[4] [1901] 2 K.B. 665.

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Brewery Co. Ltd.[5]; *Guillemard* v. *Silverthorne*[6]; *Haythornthwaite & Sons Ltd.* v. *Kelly.*[7]

Cur. adv. vult.

June 18. DEVLIN J. read the following judgment. This is a special case in which a disciplinary committee of the Potato Marketing Board states seven questions of law arising out of their decision to impose penalties on a Jack Merricks, who is a producer of potatoes at Lodgeland Farm, Ruckinge, near Ashford, in the County of Kent. The charges against Merricks were that on September 26, 1957, he obstructed officers of the board in their attempts to check the acreage of potatoes grown at his farm, and that on October 3, 1957, he failed to comply with a demand requiring him to furnish to the board information relating to potatoes planted in 1956 and 1957.

The first question stated raises matters which go to the jurisdiction of the committee. Strictly speaking, as Mr. MacKenna has pointed out, an objection to the jurisdiction should be taken by way of motion to set aside the award; but, since the facts which do or do not give rise to the jurisdiction are not in dispute, the point is a technical one and he does not take it. I hold that the committee had jurisdiction. Mr. Percival, who appears for Merricks, has not pursued before me the first objection to the jurisdiction because he says that he is precluded from doing so by authority binding upon me. His second objection is based upon the admitted fact that the chairman of the committee was paid by the board a fee for his services and so is not, Mr. Percival contends, " independent " within the meaning of the legislation whereunder the committee derives its powers. I shall at the end of this judgment give my reasons for holding that this contention is unsound, but I shall consider in the first place the main matters which have been developed in argument before me. These raise the questions whether power to " enter and inspect " includes a power to check or measure acreage and whether in the forms of demand, which the board sent out, they were asking for information, to which they were not entitled.

The Potato Marketing Board was created under a scheme made by virtue of the Agricultural Marketing Acts, 1931 to 1949. The Act of 1931 provides for the preparation of schemes for regulating the marketing of agricultural products, and sections 5, 6 and 7 specify a number of matters for which the scheme may provide. These include provisions " for empowering any person authorized " in writing by the board, for the purpose of securing compliance " with the scheme, to enter and inspect, at any reasonable time " and on production of his authority, any part of the land or " premises occupied by any registered producer (being a producer " specified in the authority) which the person so authorized has " reason to believe is used for producing the regulated product or

[5] [1900] 1 Ch. 496; 16 T.L.R. 152.

[6] (1908) 99 L.T. 584.

[7] (1926) 11 T.C. 657.

" for doing any of the following things which is regulated by the " scheme, that is to say, grading, marking, packing, or storing " the regulated product or adapting it for sale " and " for requiring " registered producers to furnish to the board such estimates, " returns, accounts and other information relating to the regulated " product as the board consider necessary for the operation of " the scheme."

Section 6 (1) (*d*) says that the scheme shall provide for securing that any producer who is aggrieved by any act or omission of the board may refer the matter to arbitration. Section 7 (1) says that the scheme shall provide for the establishment of a fund to be administered and controlled by the board and for the payment by producers of contributions to the fund of any such amount as may be necessary for the operation of the scheme and for the assessment of contributions in such manner as may be provided by the scheme.

Section 5 of the Act of 1949 requires the scheme to set up a disciplinary committee of the board, consisting of between four and six members of the board and a chairman who is not a member of the board but is an independent person who is a barrister, advocate or solicitor of not less than seven years' standing. Decisions of the committee are taken by a majority, and section 8 applies to those decisions the provisions of the Arbitration Act, 1934, which require a case to be stated if requested. Section 6 allows the committee, in addition to the imposition of penalties, to award compensation for any loss the board has sustained, for example by failure to collect contributions, and to arrive at such sums on the basis of an estimate presented by the board.

The Potato Marketing Scheme, 1955, provides for all these matters and in most of them it follows almost exactly the relevant wording of the statutes. The power of entry and inspection is given in paragraph 82 (1) of the scheme and in the same words as those used in the statute, and paragraph 81 (1) follows the words of the statute in allowing the board, whenever they consider it necessary for the operation of the scheme so to do, to serve on any registered producer a demand in writing requiring him to furnish to them such estimates, returns and other information relating to potatoes as may be specified in the demand. The power to raise contributions is exercised by paragraph 84 of the scheme, which provides that the board may from time to time by a prescriptive resolution require the contribution of sums which are not to exceed 20s. per acre of the acreage of potatoes planted by the registered producer. At all material times there was in force a resolution requiring each producer to contribute £1 per acre. Paragraph 83 (2) of the scheme sets up the discipline committee in accordance with the Act of 1949. Paragraph 83 (3) of the scheme preserves in relation to the decisions of the discipline committee the right of arbitration given by section 6 of the Act of 1931, so that a producer who is aggrieved by a decision of the committee has the choice either of requiring the committee itself

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to state a case or of referring the whole matter to an arbitrator to be determined by him afresh. Merricks did not in this case exercise his right of choice and in fact the case stated by the discipline committee was at the request of the board. Finally, paragraph 83 (1) (*a*) creates the two offences with which Merricks was charged, namely, failing without reasonable excuse to comply with a demand or requirement made by the board in pursuance of paragraph 81 of the scheme (that is, the demand for particulars relating to his potato acreage) and, secondly, obstructing or interfering with any person duly authorized by the board to enter and inspect his land and premises.

The headquarters of the board in London are under the direction of a registrar, and the board also employs divisional supervisors. The supervisor for the division in which Merricks farms is one Grimmer. Merricks did not grow any potatoes in 1956, but he did in 1957, and on August 14, 1957, Grimmer observed the crop. The case states that the board had not been informed by Merricks of the acreage of his crop, though it does not appear whether any demand for information was served upon him before October 3, 1957. At any rate, on August 15, 1957, Grimmer made a report to the board, which shows that he regarded Merricks as a defaulter and that he estimated his potato acreage at 25½ acres. On August 23 Grimmer wrote to Merricks saying that he was instructed by the board to check his potato acreage. On September 13 Grimmer went to the farm together with a chartered surveyor who was equipped with measuring poles and a chain. It is plain that Merricks had grievances against the board with which this dispute is in no way concerned, and that he was disposed to show his resentment by standing on all his rights. He objected to a measuring pole being placed on his land. The board's party withdrew to a local public-house where they were joined by Merricks a little later for a pleasant discussion about politics and agriculture—an episode which earned Grimmer a rebuke from headquarters for fraternising. The campaign was resumed on September 26. On this occasion, Grimmer read his authority to enter and inspect and Merricks said that he was advised that it did not include authority to measure. A pole was inserted and Merricks, after expressing his regret in suitable terms, removed it. The ceremony was repeated and this time Merricks, perhaps for the benefit of the press photographers, who were in attendance, cast the pole across a ditch. There was then a production of a measuring chain, to which Merricks objected, and the board's party then retired. This affair on September 26 constitutes the obstruction with which Merricks was charged. Thereafter, on October 3 Grimmer wrote to Merricks enclosing the board's forms demanding a return of his potato acreage for 1956 (although, as Grimmer knew, Merricks had not in that year grown any potatoes) and 1957. On October 8 Merricks replied that the board was not entitled to its demands, and this is the basis for the other offence with which he is charged.

The second question in the case (the first is the one relating to jurisdiction) inquires whether paragraph 82 of the scheme, which confers the power of entry and inspection, confers also the power to measure land. Mr. Percival has submitted that powers of entry and inspection, because they are an interference with the right of property, should be narrowly construed. But interference with rights of property is now such a common result of legislation that I do not think it is sensible to attribute to Parliament any special reluctance in the grant of such powers. I think that provisions of this sort should be construed in the same way as any other provisions and a fair and full meaning given to the words used. At the same time, if the board has gone beyond the powers which a fair construction of the words confers upon it, it does not matter that it has done so in a small particular, which most people would consider unimportant or harmless. Whenever a man claims to enter another's land without permission, there is a principle at stake.

It is, of course, undisputed that before determining the limits of the power that Parliament has conferred, one must have regard to the objects and scope of the legislation, in which they are contained. These powers are contained in a scheme which provides for contributions to be made according to acreage. Inevitably, therefore, anyone inspecting the land on behalf of the board must want to check the acreage; and it seems at first sight unreasonable to construe the words in such a way as to permit a rough check by eye and forbid an accurate one by measurement. But Mr. Percival has advanced an argument which greatly weakens the force of this contention.

While conceding that one must have regard to the objects of the power as ascertained from the legislation as a whole, he begins with a submission that a power to inspect, unless extended by reference to its objects, does not in its natural meaning include the power to measure. He fortifies this submission by citing a number of statutes in which a power to measure is expressly granted in addition to a power of inpection. He relies also upon the language used in *Mutter* v. *Eastern & Midlands Railway Co.*[1] where the Court of Appeal held that a power to inspect a register included a power to take copies. But in the language of Lindley L.J.[2] the power to take copies was justified as something incidental to the power of inspection because without it the right of inspection would be illusory. Mr. Percival argues that the board can succeed only if they can show that a power to measure is necessary in order to achieve the presumed object of the inspection.

He then submits that the object of the inspection must be ascertained by looking at the Act rather than at the scheme. The conferment of the power in paragraph 82 (1) of the scheme is done in words which follow almost exactly those used in the

[1] (1888) 38 Ch.D. 92; 4 T.L.R. 377.

[2] 38 Ch.D. 92, 105, 107.

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authorizing section of the Act, and the power conferred cannot be construed as any wider than the power authorized. There is nothing in the Act to show that, when authorizing the power of inspection, Parliament had it in mind that it might be used for the measurement of land or for the checking of acreage. Section 7 (1) of the Act allows contributions from producers to be assessed in such manner as may be provided by the scheme. The framers of the Potato Marketing Scheme chose to assess contributions by reference to acreage. They might equally well have done it by reference to the tonnage of potatoes harvested or sold. There are many agricultural products within the scope of the Act in respect of which contributions could not be assessed on an acreage basis; for example, milk and eggs. Mr. Percival asserts that in the several schemes prepared under the Act the Potato Marketing Scheme is in fact the only one in which acreage is relevant. If, he submits, Parliament had intended that the power of inspection should be used as a means of determining the exact contribution due from any producer, Parliament would not have limited the power, as it has done, to the inspection of land but would have allowed all commodities produced to be inspected and checked for quantity.

In any event, Mr. Percival denies that a power to measure as well as to inspect is necessary for the effective working of the scheme. I think it is true that the scheme could be made to work satisfactorily enough without the power to check acreage. Paragraph 5 (1) provides that a part of an acre is to count as a whole, so that there is no need for exact measurement in poles, perches or roods. The producer is obliged to declare his acreage under penalty of prosecution for any deliberate or reckless misstatement. An inspection without measurement can check whether the declaration is approximately correct. If the producer fails or refuses to declare his acreage, the board can estimate it and recover the contribution on the basis of the estimate unless it is displaced. It is under powers analogous to these that the income tax laws are satisfactorily worked, without the power of entering upon a tradesman's premises and going through his books. Presumably the other schemes under the Acts are made to work without the power to check the quantity of the products concerned.

I have given to all these arguments the most careful consideration, which indeed they deserve. But in the end and after hesitation, I have come to the conclusion that the more general arguments presented by Mr. MacKenna ought to prevail. I do not think it is possible to draw a hard and fast line between a power to inspect and a power to measure. I have to answer the question addressed to me in the light of all the facts set out in the case; and substantially the question is whether, in doing what they did, the board's officials went beyond what can reasonably be termed inspection of land. I do not say that every sort of measurement of land is authorized by a power to inspect land, but some forms of measurement must be. An inspector cannot be prevented from

walking or become a trespasser because he counts his paces. The question is one of degree, and in the end it comes down to this: If a man is authorized to inspect land and he takes measuring instruments with him and he uses them in the ordinary way to get an accurate idea of the size of the land as a whole, can he reasonably be regarded as a trespasser? I do not think he can. I think that power to inspect land must, unless the contrary is indicated, include the power to survey and this in reality was all that was being done here. Thus, whether the checking of acreage was contemplated or not—and, for my part, I think that Mr. Percival has made good his point that the scheme should not be construed as if it were—the words used in the scheme are wide enough to permit it.

The third and fourth points can be taken together and they deal with the propriety of the board's acts, granted that they are within the letter of the scheme. Paragraph 82 (1) of the scheme provides, as does the Act, that the power of entry may be used only "for the purpose of securing compliance with the scheme." It is submitted that measuring the acreage was unnecessary for this purpose. There seems to be no doubt that proceedings could have been taken quite satisfactorily without the inspection. Without it, the board could easily have formed—and in fact formed—an estimate of the acreage which was sufficient to enable them to recover what was due, together with appropriate penalties for the failure or refusal to declare the acreage. The officials of the board who were called before the committee said that the inspection was made on the instructions of headquarters and were not themselves able to say why it was thought to be necessary. Grimmer said, in his opinion, it was unnecessary but that his headquarters had a different opinion. Mr. Percival submits that the real object of the inspection was to make a display of bureaucratic power and to bring Merricks to heel.

I do not think that the words "for the purpose of securing "compliance with this scheme" do more than express a limitation which is implied upon all statutory powers of this sort. Statutory powers are always coupled with statutory duties and the powers must be used only for the purpose and with the object of discharging the duties imposed. It is for the authority to whom the power is granted and upon whom the duty is imposed to decide in the first instance what steps it is necessary to take under the power for the achievement of the object; the exercise of its discretion in making that decision will not be reviewed by the courts and the decision itself will be impugned only if an abuse of power can be shown. I adopt what has recently been said on this point by Barry J. in *Barber* v. *Manchester Regional Hospital Board* [3] and follow, as he did, the authority of the cases to which he refers. The burden of proving bad faith or the like is upon the person asserting it.

[3] [1958] 1 W.L.R. 181, 193; [1958] 1 All E.R. 322, 329.

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The action of the board in this matter may be criticized as unnecessarily heavy-handed. But there is no sign of bad faith; and if the board wanted to be on the safe side and obtain a professionally accurate measurement, that cannot be said to be wholly without reason. There is not in the case any express finding of fact on this point based on the whole of the evidence. I imagine that the committee, which except for the independent chairman consisted entirely of members of the board, may have found themselves in some difficulty in passing judgment upon what was in the mind of the board as a whole. What they have stated is simply that they infer that the attempt to measure was made for the purpose of securing compliance with the scheme. I take this to mean that they inferred from the doing of the act without more, or presumed, that it was done for a proper purpose and that they found no evidence to rebut that presumption. Such an approach would be correct in law and such a finding would, I think, be unimpeachable. But in any event I am prepared to hold that, the burden of proof being on Merricks, he produced no evidence of impropriety. I therefore answer the third and fourth questions in the affirmative.

I turn now to consider the validity of the demand for information served on Merricks on October 3, 1957, which is the subject-matter of the fifth question. The demand is contained in four documents, two of them (Merricks had apparently two farms) relating to the 1956 crop and two relating to the 1957 crop. These forms require the producer to state to the nearest quarter of an acre the acreage of each variety of potato, then to state the acreage of all the potatoes and finally to state the total arable acreage of the farm. The chief attack on the validity of the demand is that the board has no power to require information under the last head about the total arable acreage of the farm. I have not had to consider whether it is reasonable or unreasonable for Merricks to refuse this figure any more than I have had to consider whether it is reasonable or unreasonable of him to have objected to the measurement of his land. The board have demanded the information, not as a matter of courtesy, but as of right and under threat of penalties, to which they draw attention in large type, and they must prove their right. They have the right under paragraph 81 (1) to demand information "relating "to potatoes." I cannot see how information about the acreage of land upon which ex hypothesi potatoes are not being grown can be information "relating to potatoes." At any rate, the relationship is not apparent; and if there is a connexion which could be shown by outside evidence, it is for the board to adduce such evidence, which they have not done. I can quite see that in the operation of the scheme, or at any rate for the purposes of the trade, it may be useful to the board to know what proportion of his total arable acreage each producer devotes to potatoes, but they are not empowered under paragraph 81 (1) to demand information simply because it is useful for the operation of the scheme.

The power to obtain, and use such information if they can get it, is given under paragraph 79 and this is to be contrasted with the more limited class of information which they can get under threat of penalties by virtue of paragraph 81 (1).

But it does not follow that because a composite demand asks in one particular for information, to which the board is not entitled, that the demand as a whole is invalid, with the result that no part of it need be complied with, good or bad. There does not appear to be any authority on the point whether a demand is in such circumstances invalidated. I must, therefore, find the right answer as a matter of principle and I think that the principle to be applied is that which is applied to all classes of documents which are partly good and partly bad because, for example, they are in part illegal or ultra vires. In all these cases, the question to be asked is whether the bad part can be effectively severed from the good. I think that the demand relating to total arable acreage of the farm can be struck out from the form without altering the character of the rest of it. Accordingly, I hold that Merricks, while not bound to supply that particular piece of information, was in breach of the scheme by ignoring the rest of the form, and I answer the fifth question in the affirmative. I do not wish thereby to give any encouragement to authorities like the board to fill up their forms with questions which they are not entitled to ask, reckoning that it is the recipient's business to sort out the good from the bad. The sender of the form knows or ought to know exactly what his powers are; the recipient rarely does and may find it more of a nuisance to go and look them up than it is to go and get the bit of information required. The board can fairly be criticized for being careless in the exercise of its powers; and because of this, and because of the quasi-criminal character of the matter, Mr. Percival has invited me to treat the demand as in some way tainted and so wholly unenforceable. If there were a deliberate abuse of power, it might be so. But I see no evidence of that and I think therefore that the ordinary principle of severability should be applied.

I need not take up much time over the last two questions. The sixth involves only a finding of fact and no argument has been pressed on it. The seventh involves the same considerations as those I have already dealt with in answer to the third and fourth. It is said that the demands were unnecessary because the board was already aware from Grimmer's observations of the acreage of potatoes grown in 1957 and they were also aware that no potatoes had been grown by Merricks in 1956. But they might reasonably have thought it desirable to have their information confirmed by Merricks himself and I see no grounds for interfering with the finding of fact that the board considered the information necessary for the operation of the scheme.

As the result of the answers I have given, I uphold the awards of the case stated. Under these awards a penalty of £50 is imposed upon Merricks for his acts of obstruction; and for failing

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to comply with the demand for information there is a penalty of £20 and also an award of £25 representing the contribution due in respect of the 1957 acreage of potatoes. These penalties of £50 and £20 respectively might be thought excessive, if the view is held that Merricks had genuine grounds—even though after consideration they are found to be insufficient—for challenging the legality of the board's acts. I have no jurisdiction whatever over the amount of the penalties and no cause for commenting upon them except in so far as the comment draws attention to matters of law. It appears to me that these very substantial fines may have been inflicted because the committee took the view that there was nothing whatever in the legal objections taken by Merricks and his advisers and that the argument about them was merely an extension of a policy of unreasoning obstruction. I have made it plain that that is not my view of the arguments to which I have listened. In particular, I held that the demand for information made by the board was partly bad; and the question whether Merricks was bound to comply with it has turned out to be a novel one on which no direct authority could be cited. Whatever may have been the motive for Merricks' attitude, as things have turned out he has done no disservice to the body of producers, who are the board's constituents, by having these matters clarified. If an application is made to me for the purpose, I am prepared to consider whether I have power to remit these awards to the committee in order that they may determine, the matter being entirely for them, whether in the light of this judgment the penalties remain appropriate.

I must now state my reasons for holding that the committee had jurisdiction for determining this dispute. What is meant by "a chairman who is not a member of the board but is an inde- "pendent person who is a barrister of not less than seven years "standing. . . ."? Mr. MacKenna submits that the clause "who "is not a member of the board but is an independent person" is to be read as constituting one requirement and that the second part of it is there only to emphasize what is the essence of the requirement, namely, that the chairman is not to be a member of the board. I cannot accept this construction. I think that the provision that the chairman is to be independent adds something; for example, I think that a competing producer might be held not to be independent. I agree with Mr. Percival that independence ordinarily denotes financial independence, but I do not think that is the only sense in which the word can be used. I think that the word may be used to refer to a person who is permitted—and perhaps indeed required—by the man, who employs or retains him, to bring an independent mind to bear on a particular problem; for example, a solicitor. The term "inde- "pendent contractor" conveys what I mean. I have no doubt that it is in this latter sense—independent in the sense of being detached and not in the sense of being unpaid—that the word is used in paragraph 83 (2) (*a*) of the scheme; and I have two

reasons for so thinking. The first reason is that Parliament by the Act of 1949 has imposed upon the board the duty of setting up a disciplinary committee with an independent chairman. It follows that the board must have the duty of paying the chairman a fee if he requires one. Mr. Percival was driven to argue that the board could discharge its duty only by finding a chairman who would give his services free, but I do not think that Parliament can have meant to narrow the choice in that way. The second reason is that the disciplinary committee is not an independent tribunal in the full sense of the word. If it were, it would no doubt be surprising to find that the board, which must always be one of the two parties appearing before it, was expected to pay the chairman. But this tribunal set up pursuant to the Act of 1949 (which does not, it must be remembered, exclude the right to a wholly independent arbitration) is a committee of the board itself. If the independent chairman were to differ from the other members of the board, who sit on the committee, he could easily be outvoted. Since this is the chairman's position, it is ridiculous to suppose that it can matter much that he should be paid a fee by the board. I think that what is contemplated is that the chairman should be a person who will be able to bring an entirely independent mind to bear on any case that is presented to the committee and who, because of his legal experience, will be able to guide the committee and ensure that they approach the cases which they have to decide in a true judicial spirit. Accordingly I hold that, notwithstanding that its chairman received a fee from the board, the committee was properly constituted under the provisions of the scheme.

Award affirmed.

Argument was then addressed to the court on the jurisdiction of the court to remit the award to the committee.

DEVLIN J. In this matter, Mr. Percival has, pursuant to an intimation which I gave in the course of my judgment that I would entertain such an application, applied to me to remit this award to the disciplinary committee of the Potato Marketing Board in order that they may reconsider, in the light of the principles of law which I expressed in my judgment as being the correct ones, the assessment of penalties which they imposed upon Merricks. He makes that application under section 22 of the Arbitration Act, 1950, which is in wide terms and gives power to the court in all cases of reference to arbitration to remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire. While there is that wide power giving a jurisdiction to the judge, it is also clear that it is a discretion which has to be judicially exercised; and, if I had entertained the exercise of it in this case, I should have wanted to consider the matter very carefully, and I should have given to Mr. Percival an opportunity of drawing my attention to some of the authorities

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that might be relevant. But I do not think it is a case for the exercise of my discretion. I do not think that my discretion arises at all, because Mr. MacKenna has satisfied me that section 22 does not apply to this award and I have no power to remit this award. He submits that this is not an arbitration in the full sense of the term; it is not an arbitration to which all the provisions of the Arbitration Act, 1950, apply; it is only made an arbitration, or made akin to an arbitration, for very limited purposes by section 8 of the Agricultural Marketing Act, 1949. That section refers to sections of the Acts of 1889 and 1934 which are no longer part of the law; but, paraphrased, it provides that sections 21 and 26 of the Arbitration Act, 1950, "shall apply in relation to the hearing "and determining of the matters which by virtue of any of the "preceding provisions of this Act are referred to the disciplinary "committee of a board as if the proceedings were an arbitration "under a submission to which the board and the producer were "parties and as if the disciplinary committee were the arbitrator "or umpire under the submission." In truth, then, this is only a quasi-arbitration; "as if" are the operative words in the section. Two sections of the Act are specifically applied, and section 22 is not one of them. Therefore, prima facie, I have no power to make any order which would derive its virtue from section 22.

Mr. Percival has submitted that because section 21 applies, which is the section which deals with the stating of a case in the form of a special case for the decision of the High Court, therefore those sections which he submits are ancillary to it, of which section 22 is one, must (although not specifically mentioned in section 8 of the Act of 1949) be taken by implication to apply, as otherwise the court would be bereft of the powers, which it would have to have in order to deal with such matters adequately. One point in support of that occurs to the mind at once. Suppose the court thought that the case and the facts had not been sufficiently stated. Could it not, in such circumstances, follow the usual course of remitting the award to the arbitrator in order that he might state the facts which were necessary, so that the decision of the court could be given? Mr. MacKenna has answered that satisfactorily to my mind by saying that that power is not strictly (although it is not generally necessary to consider it strictly) derived from section 22; it is derived from section 21, which says: "An arbitrator . . . may, and shall if so directed by the High "Court, state (*a*) any question of law arising in the course of the "reference . . . "; and he submits, I think rightly, that there must be power under that section, if the case is not adequately stated, for the court to direct a further statement of the case to be made.

The other sections that are, as Mr. Percival puts it, ancillary are all sections of the sort, so far as I have been referred to them, which give the court powers to deal with what is sometimes called misconduct on the part of the arbitrators, in order to see that

justice is done, if the arbitrators are biased or otherwise misconduct themselves in the technical sense. Again it would be surprising, if this were an ordinary arbitration, if no provision were made for the court to have such powers. Mr. Percival submits that they must have such powers and that that must include the power to remit in proper cases under section 22 (1) in order that justice may be done. I do not find it necessary to draw that inference. If I did, it would assist me perhaps to state that some implications must be made in section 8 of the Act of 1949; but I see no reason in this case to say that section 8 is not by itself quite adequate for the purposes which Mr. Percival has in mind, because it is to be remembered that this is not in any sense of the term a full arbitration or a final decision on the facts. Paragraph 83 (3) of the scheme which I have been considering—and this paragraph is there by virtue of statutory provisions—permits, in effect, that any decision given by the disciplinary committee can be dealt with by the producer by his giving notice to the board referring the matter to arbitration under the provisions of the scheme and that, if the matter is so referred, no proceedings should be taken by the board otherwise than for the purposes of the arbitration. The right to independent arbitration that is given by the Acts under which the scheme is made is preserved, and this award of the disciplinary committee is not therefore a final decision on the facts. If it is right to question it on any grounds, whether the grounds of irregularity or technical misconduct or because the penalties are thought to be excessive, that can be done by the producer taking action under the paragraph of the scheme, which I have read. There is no need, therefore, to read into section 8 anything that is not there, and there is no reason to suppose that the framers of section 8 did not consider that it was quite adequate for the purposes they had in mind, that sections 21 and 26 only of the Arbitration Act, 1950, should be applied, and that there was no necessity to apply section 22.

For these reasons, I think that Mr. MacKenna is right in submitting that I have no jurisdiction and no power to remit this case. Accordingly, I refuse the application.

Application refused.

Solicitors: *Collyer-Bristow & Co. for Elliott & Gill, Hastings; Ellis & Fairbairn.*

[COURT OF APPEAL.]

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June 18, 19, 20, 24, 27.

Lord Goddard C.J., Parker L.J. and Lloyd-Jacob J.

AGRIMPEX HUNGARIAN TRADING COMPANY FOR AGRICULTURAL PRODUCTS *v.* SOCIEDAD FINANCIERA DE BIENES RAICES S.A. THE AELLO.

[1955 A. No. 1170.]

Shipping—Charterparty—Arrived ship—Ship awaiting cargo of maize compelled to wait in Buenos Aires Roads—Ships excluded from dock area unless cargo immediately available—Commercial area of port—Relevance of type of cargo—Roads not place where ships waiting delivery of grain usually lay—Whether roads within commercial area of port.

Shipping—Charterparty—Cargo, obligation of charterer to provide—Ship unable to become an arrived ship unless cargo immediately available—Charterers' failure to have cargo available—Liability of charterers for breach of contract—Whether charterers' breach matter of counterclaim or of defence.

By a port charterparty dated August 27, 1954, the steamship *Aello* was chartered to proceed as ordered by charterers to receive from them a cargo of wheat and/or maize and/or rye "at one or "two safe loading ports or places in the River Parana . . . and the "balance of the cargo in the port of Buenos Aires." The charterers had contracted with a Swiss firm to buy maize f.o.b. Argentine ports at sellers' option in accordance with an allocation received from a body called the Grain Board, and the Swiss firm in turn contracted to buy the maize from an Argentine State concern which controlled the sale and export of maize.

At the date of the charterparty the system of traffic control operated in the port of Buenos Aires did not permit vessels arriving to load maize to proceed beyond a point in the Roads called the Intersection—some 22 miles and three hours' steaming time from the dock area—until they had obtained a "giro" or permit, which was issued by the customs authority on the ship's application only when the shipper had obtained from the Grain Board a certificate to the effect that a cargo had been allocated. Once the giro had been obtained, the ship could proceed to the dock area, where vessels due to load grain usually lay, and wait there until a loading berth became available. At the relevant time supplies of maize were coming down to the port so slowly that by August, 1954, there was a congestion of vessels arriving to load maize. On September 1, 1954, to meet the temporary emergency, the port authority changed the previous system of traffic control by passing a resolution that before a giro could be issued, not only must the Grain Board's certificate be obtained, but also a cargo ready to be loaded must be available.

The *Aello* arrived at the Intersection on October 12, ready to proceed into the dock area; the shippers obtained the Grain Board's certificate on October 13; there was then no congestion in the dock area; but the charterers did not have a cargo of maize ready to be loaded until October 29. Accordingly, as a giro could not, under the terms of the resolution of September 1, be issued, the ship was compelled to wait at the Intersection until October 29.

Though various operations were normally performed at the Intersection, loading of grain at that point was quite impracticable and was never done.

The charterers, contending that the *Aello* was not an arrived ship until October 29, claimed, inter alia, the return of demurrage paid by them to the shipowners under protest. The shipowners by way of defence, or alternatively, by way of counterclaim for damages for breach of contract, contended that if the *Aello* was not an arrived ship on October 12, that was due to the charterers' breach of their absolute obligation to provide a cargo in time:—

Held, (1) that the *Aello* was not an arrived ship until October 29, for when she was at the Intersection she was not within the commercial area of the port, namely, that part of the port where a ship could be loaded when a berth was available; nor did the resolution of September 1 have the effect of extending the commercial area to embrace the Intersection.

Leonis Steamship Co. Ltd. v. *Rank Ltd.* [1908] 1 K.B. 499; 24 T.L.R. 128 applied.

(2) That where the provision of a cargo was necessary to enable the ship to perform its obligation of becoming an arrived ship, the charterers were under an absolute obligation to provide a cargo, or a reasonable part of it, in time to enable the ship to perform its obligation under the contract; and the charterers were not relieved of that obligation by showing that they had before October 29 taken all reasonable steps to provide a cargo.

Ardan Steamship Co. Ltd. v. *Andrew Weir & Co.* [1905] A.C. 501; 21 T.L.R. 723 applied.

(3) That the charterers were not in breach of contract by failing to exercise the options as to choice of cargo or loading port, for the contract gave them an absolute right to choose which option to exercise, regardless of its effect on the shipowners.

(4) That the charterers could not rely on the principle that where both parties contracted with knowledge of local conditions at a particular port, the charterers' obligation to provide a cargo did not arise until the ship's turn to load arrived, for at the date of this charterparty the shipowners had no knowledge of the conditions at Buenos Aires.

Jones Ltd. v. *Green & Co.* [1904] 2 K.B. 275 distinguished.

(5) That as the ship had never fulfilled its primary obligation to arrive geographically it could not be deemed to have been an arrived ship on October 12. The charterers' breach was a matter for counterclaim only.

Mackay v. *Dick* (1881) 6 App.Cas. 251 distinguished.

Decision of Ashworth J. [1957] 1 W.L.R. 1228; [1957] 3 All E.R. 626 affirmed.

APPEAL AND CROSS-APPEAL from Ashworth J.[1]

The following facts are taken from the judgment of Parker L.J.: The plaintiffs (charterers) are an Hungarian State trading concern responsible for the purchase of grain. On June 23, 1954, they contracted with Bunge Aktiengesellschaft of Zürich for the purchase of Plate maize f.o.b. Argentine ports at sellers' option, and in accordance with the allocation as received from a body known as the Direccion Nacional de Granos y Elevadores, Buenos Aires, hereinafter called the Grain Board. The plaintiffs under the contract were to supply tonnage.

On August 5, 1954, Bunges, through Bunge & Born Limitada, in turn contracted to buy the maize from the Institudo Argentine de Promocion del Intercambio, a State concern having the

[1] [1957] 1 W.L.R. 1228; [1957] 3 All E.R. 626.

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monopoly of purchase from farmers and of sale for export, hereinafter called "I.A.P.I.". The purchase was f.o.b. ports of the rivers not above San Lorenzo, completing in the Port of Buenos Aires.

On August 27 the plaintiffs entered into a charterparty on the Centrocon form for the charter of the *Aello* to carry the maize so purchased to Hamburg.

So far as is material the charterparty provided as follows: By clause 2 the ship was to proceed as ordered by the charterers to the under-mentioned ports or places and there receive from them a full and complete cargo of wheat and/or maize and/or rye in bulk, which cargo the charterers bound themselves to ship. Clause 3 provided that the ship should load at one or two safe loading ports or places in the River Parana not higher than San Lorenzo, and the balance of the cargo in the Port of Buenos Aires or Eva Peron (now renamed La Plata) or Montevideo at charterer's option. Clause 13 provided for payment of demurrage and clause 16 provided for despatch money. Clause 30 is an exception clause, but it is immaterial to the facts of the case. The charterparty also contained an arbitration clause.

In due course the *Aello* went to Rosario and there loaded a part cargo. On October 11 she was ordered to Buenos Aires to complete loading, and at 1.30 p.m. on October 12 she arrived at what is called the Intersection in Buenos Aires Roads which is about 22 miles (three hours' steaming time) from the dock area of the port of Buenos Aires. She had obtained free pratique and, so far as she was concerned, she was ready, when so permitted by the port authorities, to move up to the dock area and to a loading berth. In fact no permission was forthcoming, and she remained in the Roads until October 29, 1954, when for the first time she was allowed to proceed to the dock area and to a berth where she arrived at 2 p.m. on October 29, 1954. Loading, partly from lighters and partly from the elevator, was completed on November 6, when she sailed for Hamburg.

The reason for the delay between October 12 and October 29, as derived from affidavit evidence, and certain admissions made by the parties before Ashworth J.[2] which were revised and supplemented [by cabled information admitted by the Court of Appeal during the hearing of the appeals] was as follows: In the normal way a ship could not proceed beyond the Intersection without a permit, known as a giro, which is issued by the customs authority on the application of the ship. In the ordinary way this giro will be issued as soon as the shipper has obtained a certificate from the Grain Board to the effect that a cargo is available. Once the giro has been issued the ship will proceed to the dock area or inner harbour and there wait until a loading berth is available. It appears, however, that in 1954 maize was very slow in coming down to the port, and as a result there was a congestion of

[2] [1957] 1 W.L.R. 1228, 1230–1233, where a fuller statement of the facts may be found.

vessels arriving to load maize. In these circumstances the port authority on September 1, 1954, resolved that no giro should be issued to enable a ship arriving to load maize to proceed beyond the Intersection until not only such certificate had been obtained but also the cargo was ready to be loaded. This resolution of the port authority, which was designed to meet a temporary emergency, remained in force until the middle of December, 1954.

From the admissions it is clear that though the shippers obtained the necessary certificate from the Grain Board on October 13, a cargo of maize was not ready to be loaded until October 29, 1954, so that a giro could not under the resolution be issued until that date.

Further relevant facts were that: (1) at all material times the Intersection was a place where a ship would be examined by the sanitary authorities and by the customs officers; (2) inflammable materials and explosives exceeding 25 tons in amount have to be discharged there before a ship can proceed to the dock area; (3) in addition, discharge of cargo takes place at the Intersection where necessary to lighten the ship before she proceeds up river; (4) loading of grain at the Intersection would be quite impracticable and is never done.

If the ship was an arrived ship at 1.30 p.m. on October 12, lay days would have expired by 1 p.m. on October 28, and in that event demurrage in the sum of £1,887 10s. had become due. If, on the other hand, she was not an arrived ship until October 29, no demurrage was due, but the charterers would in that event have earned despatch money in the sum of £864 4s. 8d. In fact the shipowners demanded the former sum by way of demurrage before the ship sailed, and on November 15, 1954, the charterers under protest, and on the shipowners' undertaking to repay any part thereof which might thereafter be found not to have been due, paid them the sum of £1,887 10s. in order to get delivery of the bills of lading. On May 5, 1955, the charterers issued a writ in the present proceedings, claiming the two sums by way of demurrage and despatch money, and alleging that the *Aello* was not an arrived ship at the port of Buenos Aires until 2 p.m. on October 29, 1954.

The shipowners contended that the *Aello* became an arrived ship at Buenos Aires at 1.30 p.m. on October 12, 1954, and that demurrage was therefore due; they further contended that if the vessel was not an arrived ship at 1.30 p.m. on October 12, 1954, she would have become an arrived ship by 4.30 p.m. on that date, by which time she would have reached a berth in the inner harbour but for the charterers' breaches of the charterparty; that if and to the extent that they were held liable to charterers, such liability arose from the charterers' breaches of the charterparty; and they counterclaimed to recover the amount of such liability, or, alternatively, that amount less £25 (representing demurrage

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at the charterparty rate for a period of three hours, the time required for the vessel to proceed from the Roads to a berth in the inner harbour) as damages for the breaches.

On November 18, 1957, Ashworth J. gave judgment for the charterers on their claim, holding that as the Intersection, though within the legal fiscal and administrative limits of the port of Buenos Aires, was not within the commercial area of the port for a ship waiting to load maize, and, further, that as the ship was not ready physically because she had no giro enabling her to berth at some place in the dock area, the ship was not an arrived ship until October 29, and he awarded the charterers the sum of £2,751 14s. 8d. on their claim. On the shipowners' counterclaim, the judge gave judgment for them on the ground that the charterers were under an absolute duty to have a reasonable amount of cargo available to enable the ship to receive it in ordinary course; and he awarded them £2,726 14s. 8d. By agreement between the parties no order was made as to costs, the court being told that the case had been chosen as a test case affecting some 30 or 40 other ships which had been similarly delayed. The shipowners appealed. The charterers cross-appealed.

A. A. Mocatta Q.C. and *R. A. MacCrindle* for the shipowners.

Eustace W. Roskill Q.C. and *John Donaldson* for the charterers.

The following cases were cited in the course of the argument: *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[3]; *Mackay* v. *Dick*[4]; *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[5]; *Armement Adolf Deppe* v. *John Robinson & Co. Ltd.*[6]; *Hudson's Bay Co.* v. *Domingo Mumbru Sociedad Anonima*[7]; *Van Nievelt Goudrian & Co. Stoomvaart Maatschappij* v. *C. A. Forslind & Son Ltd.*[8]; *Lewis* v. *Louis Dreyfus & Co.*[9]; *United States Shipping Board* v. *Frank C. Strick & Co. Ltd.*[10]; *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers Ltd.*[11]; *Colley* v. *Overseas Exporters*[12]; *Panamena Europea Navigacion (Compania Limitada)* v. *Frederick Leyland & Co. Ltd. (J. Russell & Co.)*[13]; *McCarrick* v. *Liverpool Corporation*[14]; *Jones Ltd.* v. *Green & Co.*[15]; *Vergottis* v. *William Cory & Son Ltd.*[16]; *Little* v. *Stevenson & Co.*[17]; *Lilly & Co.* v. *D. M. Stevenson & Co.*[18]; *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[19]; *Einar Bugge A/S* v. *W. H. Bowater Ltd.*[20]; *Hogarth and*

[3] [1908] 1 K.B. 499; 24 T.L.R. 128.
[4] (1881) 6 App.Cas. 251.
[5] [1905] A.C. 501; 21 T.L.R. 723.
[6] [1917] 2 K.B. 204.
[7] (1922) 10 Ll.L.Rep. 476.
[8] (1925) 30 Com.Cas. 263.
[9] (1926) 31 Com.Cas. 239.
[10] [1926] A.C. 545; 42 T.L.R. 556.
[11] [1957] 1 Q.B. 109; [1956] 3 W.L.R. 620; [1956] 3 All E.R. 383.
[12] [1921] 3 K.B. 302.
[13] [1947] A.C. 428.
[14] [1947] A.C. 219; 62 T.L.R. 730; [1946] 2 All E.R. 646.
[15] [1904] 2 K.B. 275.
[16] [1926] 2 K.B. 344.
[17] [1896] A.C. 108.
[18] [1895] 22 R. (Court of Session) 278.
[19] [1917] 2 K.B. 193.
[20] (1925) 31 Com.Cas. 1.

Others v. *Cory Brothers & Co. Ltd.*[21]; *Postlethwaite* v. *Freeland*[22]; *Krog & Co.* v. *Burns & Lindemann*[23]; *The Barque Quilpué Ltd.* v. *Brown*[24]; *Mona Oil Equipment and Supply Co. Ltd.* v. *Rhodesia Railways Ltd.*[25]; *Tharsis Sulphur and Copper Co. Ltd.* v. *Morel Bros. & Co.*[26]; *Harrowing* v. *Dupré*.[27]

Cur. adv. vult.

June 27. LORD GODDARD C.J. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. read the following judgment in which he said that though the net result of the judgment of Ashworth J. was a balance of only £25 in favour of the charterers, the court had been told that this was a test case arising out of the congestion of ships arriving to load maize at Buenos Aires in the period September–December, 1954. His Lordship continued: Though a number of points have been taken, the two main issues which fall to be determined are:

(1) Whether the defendants' ship the *Aello* became an arrived ship when she anchored in the Roads at Buenos Aires on October 12, 1954; and this depends on the application to the facts of the case of the principle laid down in *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[1]

(2) Whether, if the *Aello* was not then an arrived ship, the plaintiffs were themselves in breach of any duty which prevented her from being an arrived ship at any time before October 29, 1954.

[His Lordship stated the facts set out above, said that it was clear from the terms of the charterparty that this was a port and not a berth charterparty, and that, despite the arbitration clause, the parties had agreed to waive arbitration in order to get the legal points decided by the courts without delay. He continued:]

As regards the law applicable, the position prior to 1908 in regard to a port charterparty was in some confusion. In that year *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[2] came before this court. Kennedy L.J., in what has often been regarded as the leading judgment on the question, held that under such a charterparty a ship became an arrived ship when she was ready and at the freighters' disposal within the named port in its commercial sense, that is, within the commercial area of the port. He set out what he meant by the commercial area as follows[3]: "In the absence "of any proof of a custom of this kind—and I may note in passing "that no evidence of such a custom was given in the present "case—the commercial area of a port, arrival within which makes

[21] (1926) 32 Com.Cas. 174.
[22] (1880) 5 App.Cas. 599.
[23] [1903] 5 F. (Court of Session) 1189.
[24] [1904] 2 K.B. 264.
[25] (1949) 83 Ll.L.Rep. 178.
[26] [1891] 2 Q.B. 647.
[27] (1902) 7 Com.Cas. 157.
[1] [1908] 1 K.B. 499; 24 T.L.R. 128.
[2] [1908] 1 K.B. 499.
[3] Ibid. 521–522.

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" the ship an arrived ship, and, as such, entitled to give notice of " readiness to load, and at the expiration of the notice to begin to " count lay days, ought, I think, to be that area of the named " port of destination on arrival within which the master can " effectively place his ship at the disposal of the charterer, the " vessel herself being then, so far as she is concerned, ready to " load, and as near as circumstances permit to the actual loading " ' spot ' (I use the convenient word which was employed by " Denman J. in *Tapscott* v. *Balfour*,[4] and by Bramwell L.J. in " *Davies* v. *McVeagh* [5]), be it quay or wharf, or pier, or mooring, " and in a place where ships waiting for access to that spot " usually lie, or, if there be more such loading spots than one, as " near as circumstances permit to that one of such spots which " the charterer prefers."

Applying that test to the facts of the present case it is claimed that all the conditions were fulfilled. Reading the test literally, that may be true, but there is a real danger of interpreting words of a judgment as if they were in a statute and without regard to the facts of the case. In the *Leonis* v. *Rank* case [6] the ship in question was not 22 miles away from the dock area; she was anchored but a few ships' lengths off the pier alongside which loading took place. I agree, of course, that distance is not a conclusive factor, but what Kennedy L.J. was, I think, contrasting throughout his judgment was an area where loading takes place as opposed to the actual loading spot. The commercial area was intended to be that part of the port where a ship can be loaded when a berth is available, albeit she cannot be loaded until a berth is available.

Buckley L.J.'s judgment [7] is, I think, to the same effect. He contrasts a " berth," meaning thereby a berth, wharf or quay or place where by the use of lighters or other means a vessel can load or discharge, with the expression " place of discharge " as meaning a place of larger area than a " berth " within which area there are a " berth " or " berths." The " place of discharge " there referred to is, I think, the same as the commercial area referred to by Kennedy L.J. I cannot think, as has been suggested in the present case, that there is any conflict between the two judgments; and it is to be observed that Lord Alverstone C.J. agreed with both.

Further, if the argument on behalf of the shipowners is correct, it would have been sufficient in the *Leonis* case [8] to define the commercial area as that area within the fiscal, legal and administrative limits of the port which embraced any place beyond which ships could not proceed without some steps being taken by the shipper. For my part, I am satisfied that the Intersection was not within the commercial area of the port before the resolution of September 1, 1954. The giro was merely the traffic signal

[4] (1872) L.R. 8 C.P. 46.
[5] (1879) 4 Ex.D. 265.
[6] [1908] 1 K.B. 499.
[7] Ibid. 512–513.
[8] Ibid.

which enabled the ship to proceed into the commercial area, namely, the dock area or inner harbour. Nor, like the judge, do I think that it is possible to say that that resolution had the effect of extending the commercial area to embrace the Intersection. The giro remained a traffic signal as before.

Accordingly, the judge was, in my judgment, right in holding that the *Aello* was not an arrived ship until October 29, 1954.

In the premises it becomes unnecessary to consider whether, as the charterers contend, the Intersection is not even within the fiscal, legal and administrative limits of the port, nor whether the absence of a police permit or of the giro itself prevented the ship from otherwise being an arrived ship.

I turn now to the second main issue which arises on the basis that the *Aello* was not an arrived ship on October 12. There is undoubtedly an absolute obligation on a shipper to provide a cargo (compare *Postlewaite* v. *Freeland*,[9] *per* Lord Blackburn [10]); and the real question is as to the point of time when that obligation has to be fulfilled. I confess that, apart from authority binding on this court, I should have thought that this obligation only had to be fulfilled as and when the ship had fulfilled its obligation of becoming an arrived ship and then only to the extent which would enable the shipper to load within the lay days or within a reasonable time if no lay days were fixed. Prior to the ship becoming an arrived ship the shipper might well be under an implied duty to concur in doing what is necessary to enable the ship to arrive or not to prevent the ship from arriving: compare *Mackay* v. *Dick*.[11] That duty, however, would be fulfilled by taking reasonable steps to that end. I would adopt the words of Greer J. in *Vergottis* v. *William Cory & Son Ltd.*[12]: "In my "judgment the obligation to provide the cargo would be fulfilled "if the shipper made and carried out arrangements for the "delivery of the cargo at the ship's side in time to load her in "accordance with the terms of the charterparty. Further, it is "difficult to understand how there can be any duty to provide "the cargo before the ship completes her inward journey and "becomes an arrived ship. It seems to me that it must be the "duty of the ship to become an arrived ship before the shippers' "duty to provide the cargo can arise. The promises on the part "of the shipowner to present his vessel in the agreed place, and "on the part of the charterer to there provide her with the agreed "cargo and load it in the agreed time, are mutual interdependent "promises. And until the ship has performed its part by arriving "at the agreed place, the shipowner cannot complain that the "cargo has not been provided." And later he said [13]: "I think "there is an implied term in the charterparty that the defen-"dants would do whatever was reasonable in order to enable the

[9] (1880) 5 App.Cas. 599.
[10] Ibid. 619.
[11] (1881) 6 App.Cas. 251.
[12] [1926] 2 K.B. 344, 354.
[13] Ibid. 355.

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"plaintiff's ship to get into the dock and so become an arrived "ship."

On this view of the law, and on the admissions made by the parties, a cargo was provided by October 29, when the ship arrived in the commercial area, and prior thereto the charterers had taken all reasonable steps to provide a cargo and thus enable the ship to proceed from the Intersection into the commercial area and become an arrived ship. On the other hand, if this view of the law is wrong and there was an absolute obligation on the charterers to have a cargo ready on October 12, then they were in breach, and, since there was no congestion of ships in the inner harbour, that breach prevented the ship from proceeding there and becoming an arrived ship.

The judge, however, felt that he was bound by the decision of the House of Lords in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[14] The charterparty in that case was undoubtedly a berth charterparty. There were no fixed lay days and the obligation to load within a reasonable time commenced from the time the ship was berthed. The ship reached Newcastle on July 14 to load coal from a particular colliery, but, owing to shortage of available cargo from that colliery, she was not allowed to berth until August 13. Even when she did berth, continuous loading was impossible and she had twice to be removed from her berth before the loading was completed. The shipowners sued for and recovered damages for detention for the 31 days before the ship was allowed to berth. The House of Lords held that the absolute obligation to provide a cargo fell to be fulfilled on July 14, so as to enable the ship to get a berth. The charterers in that case strongly relied on *Little* v. *Stevenson & Co.*,[15] in which a berth unexpectedly became vacant but no cargo was available, and Lord Halsbury L.C. had disputed the proposition of law "that a "merchant must be always ready with his cargo at all times "and in all places and under all circumstances to take advan- "tage of any such contingency, if it should arise." In *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[16] Lord Halsbury L.C. explained that while the merchant was not obliged to be ready to meet every contingency however remote, he was obliged to have a cargo ready in the circumstances of that case. Lord Davey put the matter in this way[17]: "I think that what was "there laid down" (that is in *Little* v. *Stevenson & Co.*[18]) "must be read with regard to the facts of that case, and that "all that was meant was that the shipper's or charterer's obliga- "tion is only to have his cargo ready when the ship is ready "to receive it in ordinary course, and that he is not bound to "be prepared for a contingency or fortuitous circumstance not "contemplated by either of the parties." And later he said[19]: "But, however the argument is put, I cannot accede to it. It

[14] [1905] A.C. 501; 21 T.L.R. 723.
[15] [1896] A.C. 108, 116.
[16] [1905] A.C. 501, 510.
[17] Ibid. 512.
[18] [1896] A.C. 108.
[19] [1905] A.C. 501, 514.

"appears to me that it is only putting the old question in another "way. By whose default was it that the ship did not get a "loading order? The answer, in my opinion, can only be that "it was the default of the respondents in not providing the cargo "when the ship was ready to go on the berth to receive it. It "is said that the respondents did nothing unreasonable. Be it "so. But through their misfortune (it may be) they have failed "to perform their contract with the shipowners. In short, the "respondents have not satisfied my mind that it was any part "of their contract with the appellants that the latter should "await the turn of the colliery or take the risk of the cargo not "being ready."

It is clear from that latter passage that he was treating the obligation as absolute and rejecting any test based on reasonableness.

Now it is true that in that case the ship had undoubtedly got to the commercial area of the port, and was only prevented by the absence of cargo from getting a berth. Further, as Mr. Roskill points out, there is no case in which it has been held that a cargo must be ready to enable a ship to get into the commercial area. However, bearing in mind that the charterparty in *Ardan's* case [19] was a berth charterparty, I should have thought that the principle was plain, namely, that if the provision of a cargo is necessary to enable the ship to perform its obligation, namely, to become an arrived ship, the absolute obligation of the shipper is to provide the cargo, or at any rate a reasonable part of it, in time to enable the ship to perform its obligation.

It is true that Greer J. in *Vergottis* v. *William Cory & Son Ltd.*[20] felt that if necessary he might be able to distinguish *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*,[21] but in fact he decided the case on another point, and it became unnecessary to seek to do so. Further, Scrutton L.J. in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[22] found the decision difficult to understand, and in *Einar Bugge A.S.* v. *W. H. Bowater Ltd.*[23] was clearly anxious to confine the decision to its special facts.

However that may be, I can see no valid ground on which *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*[24] can be distinguished, and, like Ashworth J., I follow it.

Before leaving this part of the case I should mention two further arguments that were raised, one by Mr. Mocatta and one by Mr. Roskill. Mr. Mocatta, for the shipowners, relied strongly on the fact that the charterers had extensive options under the charterparty. Thus they could have loaded wheat or rye instead of maize and they could have ordered the ship to complete at Montevideo. Yet, with knowledge of the conditions at Buenos Aires after September 1, 1954, they ordered the ship to that port to load maize. Thus, it is said, they prevented the ship from

[20] [1926] 2 K.B. 344, 354.
[21] [1905] A.C. 501.
[22] [1917] 2 K.B. 193, 202.
[23] (1925) 31 Com.Cas. 1, 8–9.
[24] [1905] A.C. 501.

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being an arrived ship until October 29. Attractive as this argument may appear at first sight, I am unable to accept it. Having by the contract obtained the right to exercise different options, it seems to me that they can choose which to exercise, regardless of how it may affect the shipowners. Otherwise one would be introducing a qualification into the exercise of what is by the contract an absolute right. Further, as a matter of business, it was not the charterers' option but the option of the sellers.

Mr. Roskill, on behalf of the charterers, strongly relied on such cases as *Jones Ltd.* v. *Green & Co.*,[25] in which it was held that where particular conditions at the port are known to both parties, the charterers' obligation to provide a cargo does not arise until such time as in the light of those conditions the ship's turn to load arises. Such cases were relied on by the charterers in *Ardan Steamship Co. Ltd.* v. *Andrew Weir & Co.*,[26] but it was held that that principle only applied where it was clear that both parties contracted with knowledge of those conditions. Here, for the reasons given by the judge, it is clear that the shipowners at the time the charterparty was entered into had no knowledge of the particular conditions at Buenos Aires.

In these circumstances there only remains the subsidiary question whether, as the judge held, the charterers' breach is a matter of counterclaim or whether, as the shipowners contend, it is a matter of defence.

Based on the decision in *Mackay* v. *Dick* [27] it is said on behalf of the shipowners that the *Aello* must be deemed to have been an arrived ship on October 12, and accordingly that despatch money had not been earned and that the demurrage paid under protest was properly payable. Reference was also made to *Lilly & Co.* v. *D. M. Stevenson & Co.*[28] and *Krog & Co.* v. *Burns & Lindemann*,[29] in which it is pointed out that the shipowners recovered demurrage eo nomine and not unliquidated damages. The question, however, was not argued in those two cases, no doubt because it was merely of academic interest. Indeed the same was true in *Hogarth* v. *Cory Brothers & Co. Ltd.*,[30] a Privy Council case, where Lord Phillimore said [31]: "If a ship is prevented from getting to a loading berth owing to an obstacle "created by the charterer, or owing to the default of the charterer "in performing his duty, then it is well established that the "shipowner has done all that is needful to bring the ship to "the loading place, and that the charterer must pay for the "subsequent delay. Whether the latter's measure of liability "is arrived at by giving to the shipowner damages for the delay, "or whether the lay-days are antedated to the date when they "ought to have begun, and the charterer pays for them at the

[25] [1904] 2 K.B. 275.
[26] [1905] A.C. 501.
[27] (1881) 6 App.Cas. 251.
[28] (1895) 22 R. (Court of Session) 278.
[29] (1903) 5 F. (Court of Session) 1189.
[30] (1926) 32 Com.Cas. 174.
[31] Ibid. 178–179.

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" agreed rate of demurrage, does not seem to have been deter- " mined. But no point as to which of these two measures of " payment should prevail has been made by the parties in this " case."

I think that the breach of the charterers' obligation is a matter of counterclaim and not of defence. The reason, as I understand it, why the plaintiff in *Mackay* v. *Dick* [32] recovered the price and not damages was that the machine had been delivered and the property had passed, subject only to the defendant's right to reject if the machine on a special test failed to come up to a particular standard of performance. The defendant, having prevented the holding of that test, was held to be in the same position as if the condition had been fulfilled. In other words, the price became payable not because the property was deemed to have passed but because the condition was deemed to have been fulfilled. If in such a case as this the ship had arrived, but it was provided that lay days were not to begin until something had been done which depended on the charterers' co-operation, then if the charterers refused or neglected to co-operate, that something might well be deemed to have been done. But here, if I am right, the primary obligation to arrive geographically was never fulfilled; and, that being so, I think the charterers' breach is a matter for counterclaim. Accordingly, I would dismiss the appeals.

LORD GODDARD C.J. I agree with the judgment my Lord has read, and there is nothing that I wish to add.

LLOYD-JACOB J. I agree.

Shipowners' appeal dismissed.
Charterers' cross-appeal dismissed.
Leave to appeal to House of Lords granted to both parties.

Solicitors: *Holman, Fenwick & Willan; Richards, Butler & Co.*

M. M. H.

[32] 6 App.Cas. 251.

[COURT OF APPEAL.]

PUBLIC TRUSTEE *v.* INLAND REVENUE COMMISSIONERS.

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June 25, 26.
Lord Evershed M.R., Romer and Ormerod L.JJ.

[1957 P. No. 2057.]

Revenue — Estate duty — Property chargeable — Property passing on death—Bequest to trustee for life of income from shares of residue— " . . . so long as he shall act as . . . trustee . . . by way of " remuneration "—Duty claimed on death of trustee on capital of

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PUBLIC TRUSTEE v. INLAND REVENUE COMMISSIONERS.

share—Whether exempted as income received "only . . . as holder "of an office"—Scope of exempting provisions—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*) (2) (3), *as amended.*

Trust and Trustee—Remuneration—Annuity—Life interest in share of residue by way of remuneration—Estate duty claimed on death of trustee.

A testator gave to one of the trustees of his will the income from certain shares of his residuary estate "during his life so long "as he shall act as executor and trustee of this my will by way of "remuneration for so doing . . ." On the death of the trustee, the Inland Revenue Commissioners claimed estate duty under section 1 of the Finance Act, 1894,[1] as property passing on the death, on the share of capital corresponding to the share of income to which the trustee had been entitled immediately before his death. The claim was resisted on the ground that the interest was enjoyed by the trustee "only . . . as holder of an office," and that it therefore came within the exemption from duty in section 2 (1) (*b*) of the Act:—

Held, that the Court of Appeal was bound by the dichotomy between sections 1 and 2 of the Finance Act, 1894, enunciated by Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 198; 15 T.L.R. 270, and, accordingly, since on the trustee's death his shares of the testator's residuary estate admittedly passed under section 1, the provisions of section 2 (1) (*b*) (which exempt from duty property in which the deceased was only interested as the holder of an office) had no application, and that estate duty was payable on the trustee's death.

The observations of Lord Radcliffe in *Sanderson* v. *Inland Revenue Commissioners* [1956] A.C. 491; [1956] 2 W.L.R. 98; [1956] 1 All E.R. 14 considered and not applied.

[1] Finance Act, 1894 (as amended by the Finance Act, 1946), s. 1: "In "the case of every person dying after "the commencement of this Part of "this Act, there shall, save as herein- "after expressly provided, be levied "and paid, upon the principal value "ascertained as hereinafter provided "of all property, real or personal, "settled or not settled, which passes "on the death of such person a duty, "called 'estate duty,' at the gradu- "ated rates hereinafter mentioned, "and the existing duties mentioned "in the First Schedule to this Act "shall not be levied in respect of pro- "perty chargeable with such estate "duty."

S. 2: "(1) Property passing on the "death of the deceased shall be "deemed to include the property fol- "lowing, that is to say:—(*a*) Pro- "perty of which the deceased was at "the time of his death competent to "dispose; (*b*) Property in which the "deceased or any other person had "an interest ceasing on the death of "the deceased, to the extent to which "a benefit accrues or arises by the "cesser of such interest; but exclu- "sive of property the interest in "which of the deceased or other per- "son was only an interest as holder "of an office, or recipient of the "benefits of a charity, or as a cor- "poration sole; . . . (2) Property "passing on the death of the deceased "when situate out of the United "Kingdom shall be included only, if, "under the law in force before the "passing of this Act, legacy or suc- "cession duty is payable in respect "thereof, or would be so payable but "for the relationship of the person to "whom it passes. (3) Property pass- "ing on the death of the deceased "shall not be deemed to include pro- "perty held by the deceased as "trustee for another person, under "a disposition not made by the "deceased, or under a disposition "made by the deceased more than "five years before his death where "possession and enjoyment of the "property was bona fide assumed by "the beneficiary immediately upon "the creation of the trust and thence- "forward retained to the entire exclu- "sion of the deceased or of any "benefit to him by contract or "otherwise."

In re Duke of Norfolk [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664 considered.

Decision of Danckwerts J. [1958] 2 W.L.R. 429; [1958] 1 All E.R. 550 affirmed.

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PUBLIC TRUSTEE v. INLAND REVENUE COMMISSIONERS.

APPEAL from a decision of Danckwerts J.[2]

The following statement of facts is taken from the judgment of Danckwerts J. This summons arose out of the provisions of the will of the late Viscount Northcliffe, and the question asked was whether on the death of Henry Preuss Arnholz (who was an executor and trustee of the will) estate duty became payable on a share of the capital of the testator's residuary estate corresponding to the share of the income thereof to which Arnholz was entitled immediately before his death under the terms of the will.

Lord Northcliffe made his will on March 22, 1919; he also made three codicils, but the provisions of them were not relevant on the present question. Lord Northcliffe died on August 14, 1922, and his will and codicils were duly proved on February 23, 1923, by the executors therein named.

By his will Lord Northcliffe appointed Arnholz (who was a solicitor) and Sir George Augustus Sutton to be the executors and trustees. By clause 6 of his will he devised and bequeathed his real and personal estate upon the usual trusts for conversion and the resulting residuary trust fund was directed to be held upon trust to pay the net income arising therefrom in each year in the shares and manner directed in the following paragraphs of clause 6. The direction in paragraph (26) was "As to three "equal one-hundredth parts of the said income to the said Henry "Preuss Arnholz during his life so long as he shall act as executor "and trustee of this my will by way of remuneration for so doing "and in addition to any professional charges which he may be "entitled to make in accordance with clause (23) of this my "will."

Paragraph (27) directed the payment of seven equal one-hundredth parts of the said income to Sir George Augustus Sutton during his life so long as he should act as executor and trustee of the will by way of remuneration for so doing and in addition to the specific legacy given him under clause 1 of the will.

By paragraph (28) Lord Northcliffe declared that on the failure (whether in his lifetime or afterwards) of each of the trusts declared respectively by sub-clauses (1) to (27) of that clause of the will the shares or share of income which were the subject of the trust which should have failed (including all additions thereto under the present provision) should be added to the income of such of the said trusts created by such sub-clauses (1) to (27) of clause 6 of the will as should not have failed and to the last one of such trusts when all but one should have failed and in every case except the last such addition to each trust should be in the proportion which the income then subject to that trust (including

[2] [1958] 2 W.L.R. 429; [1958] 1 All E.R. 550.

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income accrued under this present provision) should at that date bear to the income then subject to the others or other of the said trusts which should not have failed (including income accrued under this present provision).

The division of the income into 100 shares was in fact upset by the addition of provisions for the payment of three more one-hundredth shares in the second codicil dated June 23, 1920. This difficulty was resolved by the decision of Russell J. on July 28, 1924, that the additional three shares be shared equally with the gifts in clause 6 of the will so that everyone took so many 1/103 shares instead of 1/100 shares.

By clause 10 of the will the capital of the residuary estate was dealt with by certain charitable gifts.

By clause 19 of the will the testator conferred very wide discretionary powers on his trustees, stating that it was his intention that the said Henry Preuss Arnholz, whom he had known since he was 10 years old, and the said George Augustus Sutton, whom he had known since the year 1890, both of whom were well acquainted with his wishes and intentions with regard to his estate, and in whose business capacity and fairness and integrity he had the fullest confidence, and other the trustees or trustee for the time being of his will should have the fullest freedom of action and the widest and most absolute and uncontrolled discretion in all matters whatsoever relating to the administration of his estate and the carrying out of the purposes of his will.

Sir George Augustus Sutton died on December 7, 1947. No claim to estate duty on the shares of the capital of the estate in respect of which he was receiving the income on the occasion of his death was made by the Inland Revenue Commissioners.

Arnholz died on August 31, 1955. Immediately before his death he was receiving the income of 3/49½ shares of capital of the residuary estate. On the occasion of his death a claim had been made by the Inland Revenue Commissioners that estate duty was payable on those shares of capital under the provisions of section 1 of the Finance Act, 1894.

The Public Trustee took out the present summons to have determined whether the claim by the commissioners to estate duty on Arnholz's death was correct.

Danckwerts J. held that the claim to duty succeeded on the ground that the exemption in section 2 (1) (*b*) of the Finance Act, 1894, only applied in respect of property within the extended meaning given to property passing on the death in section 2, and had no application to duty payable under section 1.

The Public Trustee appealed.

John Pennycuick Q.C. and *J. A. Wolfe* for the Public Trustee.

Sir Lynn Ungoed-Thomas Q.C. and *E. Blanshard Stamp* for the Crown.

The following case was cited in argument which is not referred to in the judgments: *De Trafford* v. *Attorney-General*.[3]

LORD EVERSHED M.R. The originating summons in this case raised the question of the liability to estate duty under the Finance Act, 1894, of the estate of one Henry Preuss Arnholz, who died on August 31, 1955, in respect of a share (of which at the date of his death he was in enjoyment) of the income of the estate of the late Lord Northcliffe.

I do not think it necessary that I should go at length into the facts or, indeed, into the arguments of this case, both of which are fully stated in the judgment of Danckwerts J.[1] Suffice then to say that under Lord Northcliffe's will the income of the residuary estate was, for a period terminating as provided by the will, divided among a number of income beneficiaries, each taking a specified share or fraction, so that when any one income beneficiary died, the total income was then divided among the survivors or survivor.

At the date of Mr. Arnholz's death his share amounted to three of the 49½ shares into which the income was then divisible; but the interest in the income which Mr. Arnholz enjoyed was expressed to be given to him by paragraph (26) of clause 6 of Lord Northcliffe's will as being in respect of his acting as executor and trustee, and by way of remuneration for his so doing; though the will also contained a reference to the fact that Mr. Arnholz was indeed a very old friend of the testator.

By an order of the court made in *In re Northcliffe*,[2] it was held that on the death of any income beneficiary, save at any rate the last, there was a "passing" within the terms of section 1 of the Finance Act, 1894, of a share of the corpus of the estate corresponding to the share of the income which at his death the dying income beneficiary had enjoyed.

The claim to duty has been resisted by the Public Trustee, as the present trustee of Lord Northcliffe's estate, in reliance upon the last three lines of paragraph (*b*) of section 2 (1) of the Finance Act, 1894.

In order to make that statement intelligible, I will read the whole paragraph, which is introduced by the opening sentence of the subsection: "Property passing on the death of the deceased "shall be deemed to include the property following, that is to "say:— . . . (*b*) Property in which the deceased or any other "person had an interest ceasing on the death of the deceased, "to the extent to which a benefit accrues or arises by the cesser "of such interest; but exclusive of property the interest in which "of the deceased or other person was only an interest as holder "of an office. . . ."

Accordingly, it has been the contention of the Public Trustee,

[3] [1935] A.C. 280; 51 T.L.R. 298.
[1] [1958] 2 W.L.R. 429; [1958] 2 All E.R. 550.
[2] [1929] 1 Ch. 327.

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following an earlier decision in *Attorney-General* v. *Eyres*,[3] that the interest which Mr. Arnholz had as an income beneficiary was only an interest as the holder of an office, namely, the office of executor and trustee; but since the exemption appears in the second half of paragraph (*b*) of section 2 (1), and since it has been held and is conceded that there was here a passing of a proportionate share of the corpus under section 1, it will be apparent that the contest has raised the question of the application (and, indeed, under Mr. Pennycuick's argument, the validity today) of the celebrated dichotomy between section 1 and section 2 (1) of the Finance Act, 1894, which is enshrined in the well-known speech of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* [4] in 1899.

Mr. Pennycuick has also contended that even though the dichotomy has the consequence, if valid, that the Crown cannot charge under the terms of paragraph (*b*) of subsection (1) of section 2, but must direct their attention exclusively to section 1 of the Act, none the less the exempting words, introduced after a semi-colon by the words "but exclusive of property," amount to an exemption which is not limited by the scope of paragraph (*b*), but is of general application and corresponds accordingly to the exemptions which subsections (2) and (3) of section 2 of the Act of 1894 confer; and I understand that Mr. Pennycuick finds some peg in the semi-colon to which he seeks to attach that argument.

I confess that upon that last matter I have not been at all persuaded that those words of exemption in paragraph (*b*) can be interpreted save as a qualification of the earlier language of paragraph (*b*) itself; and, if that is right, then Mr. Pennycuick is faced, as he concedes, with the formidable difficulty that if the dictum of Lord Macnaghten must be treated as binding upon us today, then he cannot rely upon something which is exclusive to paragraph (*b*) of section 2 (1) of the Act, since the charge admittedly is made under section 1.

On the other side, Sir Lynn Ungoed-Thomas, for the Crown, has intimated an argument—though he has not developed it—that, on the facts of this case, Mr. Arnholz could not be said to have enjoyed his interest as holder of an office within the meaning of paragraph (*b*) of section 2 (1), so that no question at all arises on that paragraph. In the circumstances I do not find it necessary to say anything upon that argument, save to record the fact that Danckwerts J. rejected it.

However, Sir Lynn has also contended, as I follow him, that even if today the dichotomy cannot be as rigid as might have previously been supposed, still, if the subject is to rely upon those exempting words in paragraph (*b*), he must say that his interest is one which is properly described and brought into charge by virtue of the enlarging effect of paragraph (*b*), as distinct from being something which has come into charge by virtue of section 1

[3] [1909] 1 K.B. 723; 25 T.L.R. 298.

[4] [1899] A.C. 198; 15 T.L.R. 270.

of the Act. Again, in the circumstances, I do not find it necessary to say anything upon that point either.

Mr. Pennycuick's argument concedes that until a very recent case, that of *Sanderson* v. *Inland Revenue Commissioners*,[5] he would have been in very great difficulty in prevailing upon this court to say that we could now treat Lord Macnaghten's dictum as not excluding him from any reference to paragraph (*b*) of section 2 (1) of the Act; but in that case Lord Radcliffe, in the course of his speech, indicated that this dictum should, to use his own words, be resigned [6] " to the list of the many minor mysteries " of the law." Mr. Pennycuick says that we, having so resigned it, can treat the matter as res integra, and, in so doing, should decide the matter in his favour.

It cannot, I think, be disputed that Mr. Pennycuick's argument has formidable and attractive points in its support. For example, he relied upon the language of paragraph (*a*) of the subsection, which I will read, again prefacing it by the introductory words: " Property passing on the death of the deceased shall " be deemed to include the property following, that is to say:— " (*a*) Property of which the deceased was at the time of his death " competent to dispose." It is certainly a forceful contention to observe that " property of which the deceased was at the time of " his death competent to dispose," according to the ordinary use of the language, would include the testator's own free estate, no less than property over which he had but a general power of appointing. So it is Mr. Pennycuick's contention that, notwithstanding Lord Macnaghten's dictum, section 2 (1) cannot be regarded as dealing with property which is exclusive of property strictly within the first section; and that view is undoubtedly reflected in the speech of Lord Radcliffe. I add further that Lord Radcliffe notices language used by a very learned judge, Channell J. in *Attorney-General* v. *Dobree*,[7] and also the differing views expressed by the House in a later case, that of *Attorney-General* v. *Milne*.[8]

But, notwithstanding the weight of those arguments, I feel myself compelled to the view that in this court, as before Danckwerts J., we cannot do other than treat Lord Macnaghten's dictum as still applicable.

I think it will suffice, by way of supporting that conclusion, if I refer to the language of Jenkins L.J. in *In re Duke of Norfolk*.[9] The point was undoubtedly a different one, but no less clearly this court in its judgment, and in particular, the judgments of myself as Master of the Rolls and of Jenkins L.J., treated this dictum as one which this court must accept. Thus: " It is clearly not open," said Jenkins L.J.,[10] " to this court to " depart from the construction placed on sections 1 and 2 over

[5] [1956] A.C. 491; [1956] 2 W.L.R. 98; [1956] 1 All E.R. 14.
[6] [1956] A.C. 491, 500.
[7] [1900] 1 Q.B. 442, 450; 16 T.L.R. 80.
[8] [1914] A.C. 765; 30 T.L.R. 476.
[9] [1950] Ch. 467, 484; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.
[10] [1950] Ch. 467, 484.

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" fifty years ago by the House of Lords in *Earl Cowley* v. *Inland " Revenue Commissioners.*[11] " The Lord Justice then proceeded to cite the whole of the passage from Lord Macnaghten's speech, and without repeating it here, I have it in mind that the language includes the statement that you should read section 1 as though it had been headed: " With regard to property passing " on death, be it enacted as follows," and that you should read section 2 as though it had been headed: " And with regard to " property not passing on death, be it enacted as follows."

If that view is binding, it must be conclusive in this case, for Mr. Pennycuick's reliance upon the terms of paragraph (*b*) of section 2 (1) becomes prefaced by the opening words: " With " regard to property not passing upon death "; and ex concessionis the property with which we are concerned did pass on the death. In the *Sanderson* case [12] Lord Radcliffe's intimation of a contrary, or much modified, view was his own; it is, of course, plainly none the worse for that, but the four other members of the House did not share (or, if they did, they did not express their adherence to) Lord Radcliffe's opinion. Upon well-recognized principles, therefore, it would not be right for us, after so long a time during which Lord Macnaghten's speech has been hallowed by those who practise in this branch of the law, to treat the matter as one thrown open again by Lord Radcliffe's observations.

It may well be that this case has disclosed, perhaps for the first time, an anomaly which a strict application of the dichotomy has hitherto concealed, and there may be other anomalies—one being in relation to a corporation sole—which, if the views of the Crown, which have been indicated in argument, are right, may add some emphasis to the view that the matter is one which ought properly to be considered by, and resolved only by, the House of Lords itself.

The cases which have been cited were referred to by Danckwerts J., and it will, in the circumstances, not serve any useful purpose, or be of any use to the House (if this matter goes to the House) for me to repeat the citations or repeat the summary of the case as Danckwerts J. carefully and with accuracy expressed it.

Thinking, as I do, that we must still regard ourselves as bound by the view hitherto prevailing of the effect of Lord Macnaghten's speech in the *Cowley* case,[13] in my judgment, we can do no other than dismiss the appeal.

Romer L.J. I agree. Mr. Pennycuick's submission to us of the inter-relation of sections 1 and 2 of the Finance Act, 1894, is, as he indeed concedes, plainly at variance with the opinion that Lord Macnaghten expressed on the subject in the *Cowley* case,[13] and it is for that reason that it seems quite clear to me that

[11] [1899] A.C. 198.
[12] [1956] A.C. 491; [1956] 2 W.L.R. 98.
[13] [1899] A.C. 198.

this court cannot accept it, whatever views we might have formed on the matter if we had been able to approach it de novo.

As the Master of the Rolls has pointed out, in the *Duke of Norfolk* case [14] in 1950, this court said quite explicitly that Lord Macnaghten's opinion in the *Cowley* case.[15] was binding upon this court, and it seems to me, therefore, that the only question is as to whether anything that has happened since justifies us in now expressing a different view and saying that the matter is open to review by us.

The only material thing which could possibly be relied upon is the speech of Lord Radcliffe in the *Sanderson* case.[16] Notwithstanding the great weight which must, of course, be attributed to Lord Radcliffe's opinion it was not, at all events, expressly adopted by the other Law Lords; and it seems to me impossible to say that his speech amounts in itself to a justification for departing from the view which this court expressed in the case of the *Duke of Norfolk*.[17] In those circumstances, therefore, the matter cannot be considered by us today, because we are just as bound now, as we were in 1950, by the views of Lord Macnaghten.

I desire to express no opinion, because it is not necessary to do so, on the submission which Sir Lynn Ungoed-Thomas made, that the Crown was entitled to succeed in this case, even apart from the question of Lord Macnaghten's views. On the pure question of construction arising under section 2 (1) (*b*), which the judge described as follows [18]: "The question still "remains whether the excluding provision which is contained in "section 2 (1) (*b*), is capable of application to the case of "property which passes within the unextended or natural mean-"ing of section 1 of the Act," I entirely agreed with the conclusion at which he arrived, and in which he expressed himself as follows: "It seems to me that grammatically the second "or excluding portion of this provision must refer to the pre-"ceding or including part of the provision." I entirely accept that view of the matter, and I have nothing further to say upon that point or upon any of the other matters which have been discussed.

ORMEROD L.J. I agree that this appeal should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Russell & Arnholz; Solicitor of Inland Revenue.*

B. A. B.

[14] [1950] Ch. 467.
[15] [1899] A.C. 198.
[16] [1956] A.C. 491, 500.
[17] [1950] Ch. 467.
[18] [1958] 2 W.L.R. 429, 437.

[HOUSE OF LORDS.]

H. L. (E.)* 1958 *April* 28, 29, 30; *May* 1; *June* 25.

NATIONAL DEPOSIT FRIENDLY SOCIETY TRUSTEES . . . . . Appellants;

AND

SKEGNESS URBAN DISTRICT COUNCIL . Respondents.

Rates and Rating—"Social welfare"—Friendly society—Provision of benefits and assurances for members—Benefits provided on actuarial basis—Convalescent home—Claim for rating relief—No element of advancement of good of community—Objects not "concerned with "the advancement of . . . social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 *Eliz.* 2, *c.* 9), *s.* 8.

Friendly Society.

Ejusdem Generis Rule—Statute—Charity—"Objects charitable or . . . "otherwise concerned with the advancement of religion, education "or social welfare"—Akin to charity—Rating and Valuation (Miscellaneous Provisions) Act, 1955, *s.* 8 (1).

A society registered under the Friendly Societies Acts claimed to be entitled to the benefit of the rating relief under section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of a convalescent home and premises occupied by it on the ground that the hereditament was "occupied for the purposes of "an organization . . . which is not established or conducted for "profit and whose main objects are charitable or otherwise con-"cerned with the advancement of . . . social welfare" within the meaning of section 2 (1) (*a*). It was conceded that the society was not charitable. At the material time the society consisted of some 700,000 members and its objects were to provide on a mutual basis for pecuniary benefit of relatively small amounts to be paid to its members on the ordinary chances and changes of human life, such as relief during sickness, provision of facilities for convalescent homes, old age pay and payments to a member's family in the event of his death. There was also an insurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members. The home in question was provided by the society for its members. The society's income was devoted to the payment of interest on the deposit accounts of members, the maintenance of sufficient funds to provide on an actuarial basis for the benefits to which the members were entitled in accordance with the rules and the payment of expenses of management. No member received any dividend or share of income other than the interest at 2½ per cent. on moneys standing to the credit of his deposit account, and such sickness and other benefits as were provided for by the rules. There were certain qualifications for membership, certain restrictions being imposed as regarded health, occupation and age. A candidate was to be "in good health, of "sound constitution with no hereditary family complaint," and must "not be following an occupation considered by the committee "of management to be risky or injurious to health." The members were of the lower wage-earning class:—

Held, (1) (Lord MacDermott dubitante) that the society was not "established or conducted for profit."

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* *Present*: Lord Keith of Avonholm, Lord MacDermott, Lord Somervell of Harrow, Lord Denning and Lord Birkett.

New York Life Insurance Co. v. *Styles* (1889) 14 App.Cas. 381; 5 T.L.R. 621 applied.

Per Lord Denning. The profit made from its investments was not its main object but only a subsidiary object, a means whereby its main objects could be achieved.

Reg. v. *Whitmarsh* (1850) 15 Q.B. 600 considered.

(2) That the society was not "concerned with the advancement "of . . . social welfare"; the objects envisaged by section 8 (1) (*a*) were objects which were also the concern of charitable organizations but which might fall short of the definition of "charitable pur-"poses" in the strictly legal sense; this society, which was established entirely for the common benefit of its members, lacked the element of altruism or public benefit required by the section and, accordingly, was not entitled to relief.

Decision of the Court of Appeal [1957] 2 Q.B. 573; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199 affirmed.

APPEAL from the Court of Appeal (Hodson, Parker and Ormerod L.JJ.).

This was an appeal from the order of the Court of Appeal dated July 30. 1957 (after hearing on July 8, 9 and 10, 1957) dismissing an appeal by the appellants, the trustees of the National Deposit Friendly Society, from an order of the Divisional Court of the Queen's Bench Division (Lord Goddard C.J., Cassels and Lynskey JJ.) made on January 24, 1957. The order of the Divisional Court was made on a case stated by quarter sessions for the County of Lincoln (Parts of Lindsey) and affirmed an order of sessions made on September 17, 1956, dismissing an appeal by the appellants after the refusal of the respondents, Skegness Urban District Council, to grant them the relief against rates provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of the hereditament known as "No. 2427 convalescent home, grounds and premises, "North Parade, Skegness, in the County of Lincoln (Parts of "Lindsey)."

The facts are fully stated in the opinion of Lord Keith of Avonholm.

John Pennycuick Q.C., *John Widgery Q.C.* and *D. Barker* for the appellants.

Sir Arthur Comyns Carr Q.C. and *Charles Scholefield* for the respondents.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *Gilmour* v. *Coats* [1]; *Berry* v. *St. Marylebone Borough Council* [2]; *Income Tax Special Purposes Commissioners* v. *Pemsel* [3]; *British Launderers Research Association* v. *Hendon Rating Authority* [4]; *Nash* v. *Hollinshead* [5]; *Liverpool and London and Globe Insurance Co.*

[1] [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848.
[2] [1958] Ch. 406; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.
[3] [1891] A.C. 53; 7 T.L.R. 657.
[4] [1949] 1 K.B. 434; 65 T.L.R. 103; [1949] 1 All E.R. 21.
[5] [1901] 1 K.B. 700; 17 T.L.R. 352.

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v. *Bennett* [6]; *Attorney-General* v. *Seccombe* [7]; *Rex* v. *Special Commissioners of Income Tax, Ex parte Shaftesbury Homes and Arethusa Training Ship* [8]; *Dunne* v. *Byrne* [9]; *H. E. Green & Sons* v. *Minister of Health* [10]; *Commissioners of Income Tax* v. *Forrest* [11]; *In re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* [12]; *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [13]; *United Grand Lodge of Ancient, Free and Accepted Masons of England* v. *Holborn Borough Council* [14]; *Cababé* v. *Walton-on-Thames Urban District Council.* [15]

The following cases, referred to by Lord Denning, were not cited in argument: *Longdon-Griffiths* v. *Smith* [16]; *Bonsor* v. *Musicians' Union* [17]; *Faulconbridge* v. *National Employers' Mutual General Insurance Association Ltd.* [18] and *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.* [19]

Their Lordships took time for consideration.

June 25. Lord Keith of Avonholm. My Lords, this appeal arises out of a demand made by the respondents on the appellants for a rate for the year beginning April 1, 1956, amounting to £1,983 4s., in respect of their occupation of a convalescent home situate at Skegness. The appellants appealed to quarter sessions against that rate on the ground that they had not been allowed the relief to which they claimed they were entitled under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The rate charged in respect of the said premises for the year ending March 31, 1956, was £786 10s., and the appellants claimed that no higher rate should be charged for the following year.

It will be convenient to set out the material portions of section 8 so far as they may affect the issue between the parties: "(1) This section applies to the following hereditaments, that is "to say:—(*a*) any hereditament occupied for the purposes of an "organisation (whether corporate or unincorporate) which is not "established or conducted for profit and whose main objects are "charitable or are otherwise concerned with the advancement of "religion, education or social welfare; (*b*) any hereditament held "upon trust for use as an almshouse; (*c*) any hereditament "consisting of a playing field (that is to say, land used mainly or "exclusively for the purposes of open-air games or of open-air "athletic sports) occupied for the purposes of a club, society or "other organisation which is not established or conducted for

[6] [1913] A.C. 610; 29 T.L.R. 757.
[7] [1911] 2 K.B. 688.
[8] [1923] 1 K.B. 393; 39 T.L.R. 99.
[9] [1912] A.C. 407; 28 T.L.R. 257.
[10] [1948] 1 K.B. 34; [1947] 2 All E.R. 469.
[11] (1890) 15 App.Cas. 334; 6 T.L.R. 456.
[12] [1946] Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501.
[13] [1948] A.C. 31; 63 T.L.R. 424; [1947] 2 All E.R. 217.
[14] [1957] 1 W.L.R. 1080; [1957] 3 All E.R. 281.
[15] [1914] A.C. 102.
[16] [1951] 1 Q.B. 295; 66 T.L.R. (Pt. 2) 627; [1950] 2 All E.R. 662.
[17] [1956] A.C. 104; [1955] 3 W.L.R. 788; [1955] 3 All E.R. 518.
[18] (1952) 33 T.C. 103.
[19] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

" profit and does not (except on special occasions) make any " charge for the admission of spectators to the playing field: " Provided that this section shall not apply to any hereditament " to which section 7 of this Act applies, or to any hereditament " occupied by an authority having, within the meaning of the " Local Loans Act, 1875, power to levy a rate. (2) For the " purposes of the making and levying of rates in a rating area, " for the year beginning with the date of the coming into force of " the first new valuation list for that area (in this section referred " to as ' the first year of the new list '), and for any subsequent " year, the amount of rates chargeable in respect of a heredita- " ment to which this section applies shall, subject to the following " provisions of this section, be limited as follows, that is to say: — " (*a*) for the first year of the new list, the amount so chargeable " shall not exceed the total amount of rates (including any special " rates) which were charged in respect of the hereditament for the " last year before the new list came into force. . . ."

It is sufficient to say that the first year of the new list was the year beginning April 1, 1956.

The appellants' claim is that their convalescent home is a hereditament qualified for relief under that section.

No dispute arises upon the facts. As stated by the appellants, they are the owners and occupiers of a convalescent home and premises situate at North Parade, Skegness, and the respondents are the rating authority for the area in which the said premises are situate. The appellants are the trustees of a friendly society known as the National Deposit Friendly Society founded in 1868 and first registered under the Friendly Societies Acts on August 27, 1872. At the material time the society consisted of some 700,000 members, and its objects are to provide on a mutual basis for pecuniary benefits of relatively small amounts to be paid to its members upon the ordinary chances and changes of human life such as relief during sickness, provision of facilities in convalescent homes, old age pay and payments to a member's family in the event of his death. The society also contains an insurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members.

The society has no proprietors or shareholders, and all subscriptions received from members or income from investments held by the society are applied to the provision of the benefits above referred to. The committee of management, divisional committees and district committees of the society are not entitled to receive any remuneration for their services apart from travelling and subsistence allowances. The amount of each member's subscription is calculated on an actuarial basis to ensure that the income of the society is sufficient to provide the benefits prescribed by the society's rules. No dividend or share of income is paid to members except that each member is entitled to interest at 2½ per cent. per annum on the amount standing to his credit with the society in addition to the benefits so prescribed by the

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rules of the society. The last-named benefits are not available to anyone who is not a member of the society. The hereditament in question here is used by the said society as a convalescent home for its members, the provision of accommodation in such a home being one of the benefits provided by the rules of the society.

To this statement of the appellants it should be added that there are certain qualifications for membership, among which are the following: In the main benefit section members are classified according to age at admission. Certain restrictions are imposed as regards health, occupation and age. Thus, "A candidate shall "be in good health, of sound constitution, with no hereditary "family complaint and shall not be following an occupation "considered by the committee of management to be risky or "injurious to health." (Rule 83 (2) (*c*).)

A candidate unable to fulfil these conditions "may be "admitted in a class lower than that to which his age entitles "him." (Rule 83 (2) (*d*).)

"The admission of males from 45 to 50 years of age, and "females from 40 to 45 years of age, shall be conditional upon the "payment by them of a premium to the sickness reserve "fund . . ." (Rule 83 (2) (*e*).)

Members may be reclassified by the committee of management in certain circumstances, among which may be noted "upon "change of employment to an occupation considered by the "committee of management to be risky or injurious to health" (rule 83 (4) (*a*) (ii)), and, on the application of a member, upon ceasing to follow such an occupation, if the member is a male not over 50 years of age or, if a female, not over 45 years of age at the time of the application (rule 83 (4) (*b*) (ii)).

It is also provided by rule 96 (1): "A member shall forfeit "his title to any benefit other than death benefit when: (*a*) He "shall refuse to answer satisfactorily any question respecting his "health or employment put to him by an officer of the society, "or shall by any wilful act prevent or delay the recovery of his "health. (*b*) His monthly contributions are four months in "arrear. (*c*) He is suffering from any complaint, disease, sick-"ness or injury which he concealed at the time of his admission "into the society, or which he may have contracted by profligacy, "drunkenness or by any act whatsoever contrary to law."

Regulations of a corresponding character are made for admission to the alternative benefit section.

Separate provision is also made for admission to the insurance section with a limit of £500 payable on death of a member or under an endowment insurance and of £104 a year for a pension or annuity. It is accepted, I think, by both sides that the society, subject to the restrictions of the Friendly Societies Acts, is truly a mutual insurance society. The point was taken by counsel for the appellants that it provided a form of social

security within the financial reach of weekly wage earners against sickness, disablement or death.

The society possesses investments amounting to over £22,000,000 in book value and over £21,000,000 in market value, as well as other assets, which result in a surplus fund of £448,066 at December 31, 1955, after debiting members' balances, various reserve funds and other liabilities.

In the case stated by quarter sessions it is found in paragraph 2, inter alia: "(D) The policy of the appellants in the "investment of their accumulated funds is to choose investments "which offer the highest return of income consistent with security "of capital. No attempt is made to select investments with a "view to capital accretion. (E) The income of the appellants is "devoted to the payment of interest on the deposit accounts of "members, the maintenance of sufficient funds to provide on an "actuarial basis for the benefits to which their members are "entitled in accordance with the said rules and the payment of "expenses of management. No member receives any dividend "or share of income other than interest at 2½ per cent on moneys "standing to the credit of his deposit account and such sickness "or other benefits as are provided by the said rules. (F) So far "as the questions are questions of fact (1) the appellant society "is not established or conducted for profit; and (2) apart from "the welfare of individuals who subscribe, there is absent any "element of advancement of the good of the community because "the society's benefits are not available to anyone who is not a "member." They were of opinion "(A) that the appellants are "an organisation which is not established or conducted for profit; "but (B) that the appellants, being concerned only with the "provision of benefits for their own members, the main objects "of the appellants were not concerned with the advancement of "social welfare within the meaning of the said section 8" (para. 6).

On appeal, by way of case stated, to the Divisional Court, the court (Lord Goddard C.J., Cassels and Lynskey JJ.) agreed that the quarter sessions had come to a right decision and dismissed the appeal. On further appeal to the Court of Appeal (Hodson, Parker and Ormerod L.JJ.) this decision was upheld, Parker L.J. giving the judgment of the court. The case now comes, with leave of the Court of Appeal, to your Lordships' House.

The contention of the appellants is that their society is not established or conducted for profit, and that it is an organization whose main objects are concerned with the advancement of social welfare. It is common ground that it is not a charitable organization.

Differing views have been expressed by the judges who have considered this case. Lord Goddard C.J. doubted whether the society was not conducted for profit but found it unnecessary to go into that. His view was that the main object of the society was to carry on an insurance business and that that was not

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social welfare. Lynskey J., while agreeing with Lord Goddard, thought that " social welfare " in its context with " charitable " connoted an eleemosynary idea, and that it could not be said of a body providing benefits on an actuarial basis to its members that its main purpose was of an eleemosynary effect for the purpose of the business carried on.

The Court of Appeal considered that the earning of profits was purely incidental to the society's business, and that it was not established or conducted for profit. As the exemption from rates was at the expense of the general body of ratepayers it would be right, they thought, in the case of any doubt, to give the words of the provision a restricted meaning. The court thought that,[1] unless some restriction could be implied from the context, " the " provision of benefits which tends directly to improve the health " or conditions of life of individuals comes prima facie within the " expression ' social welfare.' " They found such a restriction in the words " objects concerned with the advancement of . . . " which they read as requiring the advancement of social welfare as an end in itself or for its own sake. The Court of Appeal also agreed with Lord Goddard that it was remarkable, if Parliament had intended friendly societies to have special treatment with regard to rates, that it should not have said so in plain terms, as in some of the taxing statutes.

My Lords, these views were canvassed very fully in the course of the hearing of this appeal. Other submissions were also put forward from one side or the other on what, in their context, the words " social welfare," or " the advancement of social welfare," or " objects concerned with the advancement of social welfare " were apt to cover. These I shall refer to later, but first I turn to the question whether the appellant society is an organization established or conducted for profit.

The society may, I think, quite properly be described as a mutual insurance organization set up to provide benefits for its members in the various mischances of illness, disability and old age that may befall them during membership, and to afford them an opportunity of taking out whole life assurances, endowment assurances and old age annuities for themselves, and certain other defined types of insurance. A man might, in a sense, provide similar benefits for himself without joining any society by setting aside and investing a lump sum, or annual amounts, to accumulate with interest and to provide a nest egg against some emergency, or contemplated event although such a scheme would be inadequate against unexpected early illness or death. The interest earned would necessarily be subject to tax but it could not, in my opinion, be said that he was engaged in earning a profit, or in setting up a profit-earning scheme. The accumulated sum is capital belonging to the person concerned. There are obvious advantages in joining with some 700,000 others to provide against such contingencies on a mutual basis and the mutual

[1] [1957] 2 Q.B. 573, 581; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199.

organization does not take on the character of a profit-making organization by the mere addition of numbers. This was, in my opinion, the ratio of the decision of this House in *New York Life Insurance Co.* v. *Styles*,[2] which is, I think, conclusive on this point. The Court of Appeal thought that profits, or something in the nature of profits, were earned by the society for its members, but that this was purely incidental to the purpose for which the society was formed, and that it could not be said that it was established or conducted for profit. It may well be that on change of its investments the society on some occasions realized a capital appreciation just as on other occasions it may have suffered a capital loss. But it was not trading in its investments and the position in the case of this mutual society does not seem to me to be different in any way from what it would be in the case of a single individual. The society holds very large investments which earn large sums of interest and rents. These are, no doubt, profits and gains for the purpose of the Income Tax Acts but, in my opinion, the existence of these investments does not make the society an organization "established or conducted for profit" within section 8 of the Act of 1955. If it were otherwise many charitable organizations holding investments would be cut out of the benefit of the section.

The argument for the appellants on the second limb of the section is very simple. The protection afforded through the benefits provided by the society to its members is, it is said, a species of social welfare and the objects of the society are concerned with the advancement of this type of social welfare. Reliance was placed upon certain words used by Lord Tucker in *Inland Revenue Commissioners* v. *Baddeley*,[3] with reference to the phrase "the promotion of social well-being." This phrase, said Lord Tucker, "would appear to cover many of the activities "of the so-called 'welfare State' and to include material benefits "and advantages which have little or no relation to social ethics "or good citizenship, concepts which are themselves not easily "definable." Further it was submitted that nothing turned on the introduction of the word "advancement." It meant no more than being concerned with religion, education or social welfare. For instance, any organization is concerned with the advancement of education which is concerned with instruction or education. So the advancement of social welfare includes making people socially well. at least where it is sought to attain that end among people in the wage-earning class, as here. No distinction can be made between the advancement of social welfare and the provision of the social welfare of a class. On the other side, it was said that advancement of social welfare involves the conception of an organization for the spread of social welfare, of devotion to good works, as suggested by Lord Evershed M.R. in *General Nursing Council for England and Wales* v. *St. Marylebone*

[2] (1889) 14 App.Cas. 381; 5 T.L.R. 621.

[3] [1955] A.C. 572, 613; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.

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Borough Council,[4] of some propagation or encouragement of social welfare from the outside on altruistic grounds, or motivated by Good Samaritan principles.

It was pointed out and accepted by both sides that it had been the practice of rating authorities prior to the passing of the Act of 1955 to make sympathetic assessments on charitable organizations as a matter of grace and that the Local Government Act, 1948, transferred the duty of making valuations to the valuation officers of the Inland Revenue as from April 1, 1956, and so deprived the local rating authorities of making sympathetic assessments in the case of charitable organizations. These sympathetic assessments had been freely made not only on charitable organizations in the strictly legal sense but on charitable organizations in the popular sense. The Valuation for Rating Act, 1953, had provided by section 2 that houses, private garages and private storage premises should be rated at 1939 values for the first valuation list after March 31, 1956. This meant that other premises, including those of associations not being carried on for profit, would be very badly hit by the new and greatly increased valuations. Accordingly the relief under section 8 of the Act of 1955 was introduced. Thus, it was suggested by the appellants' counsel, this section should be given a liberal interpretation in favour of non-profit making organizations. A subsequent statute, the Rating and Valuation Act, 1957, was passed to meet the situation by giving relief in the shape of a deduction of one-fifth of the net annual value of all non-industrial hereditaments, but this, in my opinion, is irrelevant on the point of the construction of the Act of 1955. The respondents, on the other hand, relied on the legislation of 1953 as supporting the view that section 8 should be given a restricted construction as otherwise shops and other premises that were not derated and did not come under the relief of section 8 would be the more heavily burdened.

My Lords, the scope of section 8 of the Act of 1955 is, in my opinion, difficult of precise definition. It would, I think, be unsafe to venture on any definition or delimitation for the purposes of the present case. The varieties of organizations to which the terms of the statute may be thought to apply are infinite and each case must, in my opinion, be considered on its own merits. Some of the suggested criteria or tests advanced by counsel for the parties may be helpful in certain cases, but I am not satisfied that they are exhaustive. If I may venture on a general observation, it is that the words " or are otherwise concerned with the " advancement of religion, education or social welfare " indicate that the section is concerned with objects which are also the concern of charitable organizations but which for some reason or other may fail to come under the definition of " charitable " purposes " in the strictly legal sense. Some organizations, prior to 1955, seem to have been given sympathetic assessments

[4] [1958] Ch. 421, 436; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685.

by rating authorities which were charitable in the popular rather than in the legal sense. On the other hand, the section shows that the objects of an organization need not be wholly charitable. It is sufficient if its main objects are charitable, but that leaves it open, if its main objects are not charitable in the legal sense, to say that they are concerned with the advancement of religion, education, or social welfare. I attach some importance to the words " concerned with the advancement of " as did also the Court of Appeal. These words import, I think, some limitation on the words which follow. It would have been very simple otherwise to have said " are otherwise concerned with religion, " education, or social welfare." But whatever width may be given to the words of section 8 (1) of the statute, I find myself unable to hold that an organization like that of the appellants, formed for the mutual assurance of members admitted on a selective basis, albeit described to us as members of the lower wage-earning class, can be described as an organization whose main objects are concerned with the advancement of social welfare. The benefits provided are benefits provided by the members for themselves. The desire for protection in time of need is the common bond that has brought them together. That is a most laudable object, but I find it impossible to distinguish their organization in any essential respect from any mutual insurance society which provides similar, if more enlarged, benefits for a wider and more diverse cross-section of the community.

I would dismiss the appeal. The costs of the appeal must be borne by the appellants.

LORD MACDERMOTT. My Lords, the appellants are the owners and occupiers of a convalescent home in Skegness in respect of which they claim to be entitled to the measure of rating relief provided by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. To make good their claim the appellants must bring the home within the description contained in subsection (1) (*a*) of that section which reads as follows: [His Lordship read the enactment and continued:] The appellants are the trustees of the National Deposit Friendly Society. This Society has been registered under the Friendly Societies Acts since 1872. It has some 700,000 members and its objects are, in the words of the appellants' written case, " . . . to provide on a " mutual basis for pecuniary benefits of relatively small amounts " to be paid to its members upon the ordinary chances and changes " of human life such as relief during sickness, provision of facilities " in convalescent homes, old age pay and payments to a member's " family in the event of his death." The society also has an assurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members.

The subscriptions received from members and the income of the society's substantial investments are applied to the provision of benefits, and the amount of each member's subscription is

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calculated on an actuarial basis to ensure that the society's income is enough to provide the benefits prescribed by its rules. These benefits are not available to anyone who is not a member of the society. Admission to ordinary, that is, to benefit membership, is at the discretion of the committee of management who must be satisfied regarding the age, health, character and occupation of the applicants. Each member is entitled to interest at 2½ per cent. per annum on the amount standing to his credit with the society, but apart from that and the prescribed benefits no dividend or share of income is payable to members.

The home in question is provided by the society for its members and the use of it is one of the benefits referred to in the rules. Nothing, however, turns on the actual nature of this user. The society has many properties in different parts of England and if the appellants are right in their present contentions, the relief they now claim must extend far beyond the premises they hold for convalescent purposes.

If the rated property is to come within section 8 (1) (*a*) of the Act of 1955 three conditions have to be fulfilled—first, it must be a hereditament occupied for the purposes of the society; second, the society must be an organization which is not established or conducted for profit; and third, the society's main objects must be charitable, or "otherwise concerned with the advancement "of religion, education or social welfare."

Of these requirements the first is clearly satisfied. The second has been a matter of controversy throughout the litigation, but Quarter Sessions found and the Court of Appeal held that the society was not established or conducted for profit. As at present advised, I am not disposed to differ from that view, but I do not need to express a final opinion upon it and I shall therefore refrain from doing so and proceed on the assumption that this condition, too, is fulfilled. Coming to the third condition, the issue is further narrowed by certain concessions which the appellants have made, namely, that the main objects of the society are neither charitable nor otherwise concerned with the advancement of religion or education, and also that the words "advancement "of" apply to "education" and "social welfare" no less than to "religion." There can be no question as to the propriety of these concessions and the point left for determination, accordingly, is whether in law the main objects of the society are "other-"wise concerned with the advancement of . . . social welfare."

My Lords, "social welfare" is, on any view, a wide and difficult expression. The Court of Appeal[5] regarded "welfare" as denoting a "state of being well, whether in the physical, mental "or material sense" and, founding on what Lord Tucker said in *Inland Revenue Commissioners* v. *Baddeley*,[6] respecting the phrase "the promotion of social well-being," thought that, apart from any restriction to be implied from the context, "the provision of "benefits which tends directly to improve the health or conditions

[5] [1957] 2 Q.B. 573, 581.
[6] [1955] A.C. 572, 613.

" of life of individuals comes prima facie within the expression " ' social welfare.' " On consideration I must confess to having some doubt as to whether that conclusion may not go too far. Though I am not sure that this expression has as yet gained a settled primary sense, I would hesitate to regard it as synonymous with " social well-being." That phrase may be employed to describe a state of comfort and plenty, but " social welfare " seems to me to savour, at present anyway, more of those needs of the community which, as a matter of social ethics, ought to be met in the attainment of some acceptable standard. It is, however, unnecessary for me to reach a decision respecting the true import of " social welfare " in this case and, in the circumstances, it is perhaps better not to make the attempt. Instead, I shall assume for the purposes of this opinion, and in favour of the appellants, that the expression is, in itself, apt as a comprehensive description of the society's main objects.

On this assumption the next question is whether the context nevertheless excludes the appellants' premises from section 8 (1) (*a*). I am satisfied that it does. I find it impossible to regard paragraph (*a*) as referring to two categories of main objects—the one charitable, the other not—which have no feature or quality in common. The purpose of the paragraph—to provide a basis for the relief of certain ratepayers at the expense of others—makes some worthy attribute which will pervade both categories a likely requirement. From the language which Parliament has used it seems to me that the paragraph provides for this and makes it necessary for every object that comes within it to have a common and commendable quality. Though the objects which constitute the second category—" the advancement of religion, " education or social welfare "—are not charitable, there can be no doubt that they are akin to what is charitable and have been intentionally described as such; there is nothing in their description incompatible with charity and if they fall outside what is charitable it is not because they are in conflict with the legal concept of charity, but because they lack some one or more of its characteristics. But perhaps the clearest indication of a common factor is the use of the word " advancement " in the second category. It is a word which has long been associated with charitable purposes, particularly in relation to religion and education, and it stands for something of importance in what is legally charitable. Its insertion in the non-charitable category seems to me to indicate the existence of a close link between the categories and to be difficult to explain on any other basis.

The same purposeful word, in my opinion, also indicates the nature of this link. In *In re Cranston, Webb* v. *Oldfield*,[7] Fitz-Gibbon L.J. said this: " The essential attributes of a legal " charity are, in my opinion, that it shall be *unselfish*—i.e., for " the benefit of other persons than the donor—that it shall be " *public*, i.e. that those to be benefited shall form a class worthy,

[7] [1898] 1 Ir.R. 431, 446.

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" in numbers or importance, of consideration as a public object " of generosity, and that it shall be *philanthropic* or *benevolent*— " i.e., dictated by a desire to do good."

My Lords, what FitzGibbon L.J. said by way of defining the public nature of a charity may be open to review in the light of the decision of this House in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*,[8] but there can be no doubt that unselfishness and benevolence are still of the essence of legal charity. That is not to say, and I do not think FitzGibbon L.J. meant to suggest, that the unselfish element must be absolute in the sense that what would otherwise be charitable will fail to be so if its founders or promoters incidentally take some degree of benefit. The principle, as I understand it, is that a valid charity must be substantially altruistic and benevolent in its purposes. That quality, which is, of course, but one facet of legal charity, appears to me to be reflected in the word " advancement " as used in the paragraph in question, for there it seems clearly to be used as it is commonly used in relation to what is charitable, and, so used, I think it must be construed as implying a desire to do good to others.

If, then, as I would hold, that is the nature of the quality which links and runs through the categories mentioned in section 8 (1) (*a*), it remains to inquire whether the objects of the society possess or lack this quality. In my opinion, they lack it. That they promote the well-being of the society's members may be taken for granted, but that is not the test. The society's benefits are provided for and confined to its subscribing members and are enjoyed by them, not incidentally or by the side of some wider, dominating purpose, but because such benefits are the whole aim and object of the association for mutual benefit which the society is. It is the private interests of its own subscribing membership that the society promotes and, admirable as that may be, it cannot be considered as in any relevant sense an altruistic activity. For this reason I am of opinion that, whatever " social welfare " may be, the objects of the society are not concerned with its " advance- " ment " within the meaning of section 8 (1) (*a*).

I would therefore affirm the decision of the courts below and dismiss the appeal.

Lord Somervell of Harrow. My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack. The words used are general, and I agree it would be unsafe, and I think also it would be impossible, to find some definition in other words which would be of assistance in subsequent cases. This is not one of those rare cases, as my noble and learned friend implies, in which assistance can be got from other cases in which the courts have had to construe and apply different words from those under consideration.

Lord Denning. My Lords, in order to understand section 8

[8] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

of the Act of 1955 it is as well to know the background against which it was enacted. It is legitimate for this purpose to take notice of matters generally known to well-informed people. The background here—as both counsel agree—is that previously, in the days when the local authorities were entrusted with the task of assessing the value of properties, they used to make "sympathetic" assessments. If they thought that an organization was deserving of some relief from the burden of rates, they used to make a very low, even a nominal, assessment of the value of its property: so that when the rate was afterwards made by the rating authority, at so many shillings in the pound, the sum payable by the deserving organization was very small. There was no statutory authority for this practice. It was just done and nobody objected, because it was in a good cause. By recent enactments, however, Parliament has taken away from the local authorities the task of assessing the value of properties and has entrusted it to the valuation officers of the Commissioners of Inland Revenue. These officers have to assess values on uniform standards—applicable over the whole country—without favour or sympathy for anyone. This has meant a great increase in the values placed on the properties of these deserving organizations: and if they were called on to pay the full rate, at so many shillings in the pound, on these new assessments, they would have to pay far more than they used to do: and the effect of the sudden change on their finances might well prove disastrous. In order to help these deserving organizations over this difficulty, Parliament enacted section 8 of the 1955 Act, which provides that for the first year they should not have to pay more than they did before, and that for the following three years at least they should only have to pay on a reduced basis. Full rates, however, will become payable if the local authority give three years' notice to that effect. Over and above this temporary assistance, Parliament, by the self-same section, has given the local authorities a permanent discretion to help these deserving organizations by reducing or remitting the rates payable by them. It is, therefore, a question of great importance to an organization to know whether it comes within the deserving category or not. Hence the many cases now coming before the courts.

Section 8 is framed very widely, no doubt because Parliament intended that local authorities should be able to do much as they had done in the past—to give relief from rates where they considered it to be deserved: but at the same time Parliament did intend to lay down some limits to the organisations which could be considered deserving, as otherwise there might be undue variation between one rating area and another.

In applying section 8 (1) (*a*) the first thing to notice is that it covers "*any* hereditament occupied for the purposes" of the deserving organization. Our present case happens to concern a

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convalescent home at Skegness, but the question for consideration would be just the same if we were considering the head office of the society in Buckingham Palace Road. If the convalescent home is entitled to statutory relief from rates, so are the commercial offices of the society.

In order to qualify for the benefit of the section, the society must be an organization "which is not established or conducted "for profit."

I have no doubt that this society was not "established" for profit. Like other friendly societies it was, no doubt, established to encourage thrift among people of small means. Rule 2 (1) shows that its object was to enable its members, by the pooling of their contributions, to establish a common fund or funds, out of which they would receive relief during sickness, medical benefit, old age pay, and money to be paid on death. Rule 2 (2) shows that, if there was any surplus due to a member —after providing for the benefits—the society was to accumulate it at interest for him. The society was, therefore, in its inception, very like a simple mutual insurance association in which a group of individuals pay premiums representing their share of the estimated "risk": and at the end of the year any surplus is returned to them or applied in reduction of the next premiums. Such an association, so long as it is conducted on that basis, does not make profits, see *New York Life Insurance Co.* v. *Styles*.[9] The basis of that decision, as I understand it, is that the surplus is returned to the contributors, or at any rate credited to them.

But has the society, in the course of its history, changed its character? Is it now "conducted for profit"? It is not a small group of individuals. It has 700,000 members. Although it is not an incorporated body, it is a legal entity—or at any rate so like one that I doubt whether anyone can tell the difference, see *Longdon-Griffiths* v. *Smith*,[10] *Bonsor* v. *Musicians' Union*.[11] The largest section of its undertaking is the deposit section, which is conducted in this way: the members pay contributions to the society, out of which it pays the sickness and other benefits. Any surplus is credited to the members' deposit accounts. But many members, in addition to their contributions, often make direct payments into their deposit accounts. These direct payments amount in all to very large sums. The deposit accounts carry interest at 2½ per cent. and can be withdrawn on notice. The society invests the contributions and deposits in authorised investments. In making these investments the policy of the society "is to choose investments "which offer the highest return of income consistent with "security of capital . . . no member receives any dividend or

[9] 14 App.Cas. 381.
[10] [1951] 1 Q.B. 295, 299; 66 T.L.R. (Pt. 2) 627; [1950] 2 All E.R. 662.
[11] [1956] A.C. 104; [1955] 3 W.L.R. 788; [1955] 3 All E.R. 518.

" share of income other than interest at 2½ per cent. on moneys " standing to the credit of his deposit account and such sickness " or other benefits as are provided by the said rules." And it is to be noticed that the society does not have to pay any income tax, see section 440 (1) of the Income Tax Act, 1952.

This policy of the society has yielded impressive results. The members' balances (representing the money due to them by the society, including accrued interest) stand at some £14 million. But the society's investments stand at some £22 million (which bring in an income of £880,000 a year). The society has, therefore, the very substantial reserve of some £8 million. This reserve is credited in the accounts, as to £5½ million to the sickness reserve fund, and £2½ million to the death benefit fund. It may well be asked: How has this vast reserve accumulated unless it be from profits made by the society on its investments? It does not require much imagination to suggest that it has received 4 per cent. or 5 per cent. on its investments (free of tax) and paid out only 2½ per cent. to its members. This is a far cry from a simple mutual insurance association which in fact returns any surplus to its members. It is far removed, too, from the complicated mutual insurance corporations of today which in theory—but not in reality—return surpluses to contributors, see *Faulconbridge* v. *National Employers' Mutual General Insurance Association Ltd.*[12] and the Report of the Royal Commission on Taxation of Profits, paragraphs 589 and 590. None of those mutual associations has anything corresponding to the deposit section of this society.

Looking at the way in which the society has conducted its affairs, I am of opinion that it has made profits. It has not distributed those profits like a commercial company. Nor has it returned them to members. It has used them to build up large and accumulating reserve funds. But the fact that the society has made profits does not mean that it is " conducted " for profit," which I take to mean " conducted for the purpose " of making profit." Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects. So here it seems to me that if the making of profit is not one of the main objects of an organization, but is only a subsidiary object—that is to say, if it is only a means whereby its main objects can be furthered or achieved—then it is not established or conducted for profit, see *Reg.* v. *Whitmarsh*,[13] *Bear* v. *Bromley*.[14] Applied to this case, I think that

[12] (1952) 33 T.C. 103, 125–126.
[13] (1850) 15 Q.B. 600.
[14] (1852) 18 Q.B. 271.

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the building up of a reserve fund—despite its size—is not one of the main objects of this society. It is only incidental—a consequence of the wise investment policy it has pursued. The main object of the society is to provide security for people of small means against the risks which life holds for them—and not to make a profit therefrom. It is therefore not conducted for profit.

The next thing that is necessary, in order to enable the society to qualify for the benefits of section 8 is that its "main objects are "charitable or are otherwise concerned with the advancement of "religion, education or social welfare."

It is quite plain that by those words Parliament intended to extend the benefit of the section beyond the field of legal "charities." In law "charitable" is a term of art with a technical meaning which is narrower than its popular meaning. In this section Parliament intended to expand the technical meaning so as to embrace a wider group of deserving organizations.

Thus Parliament does not limit the organizations to those whose objects are "exclusively" or "only" of a particular character as it has done in some statutes. It is sufficient if the "main objects" of the organization—which I take to mean all of its main objects as distinct from its subsidiary objects—are of that character. For instance, a scientific institute would qualify for the benefit of the section if its main object was the advancement of education even though it had, as a subsidiary object, the purposes of its members. But in order to ascertain the "main "objects" of an organization, you are entitled, I think, to look not only at its rules but also to consider the way in which it has conducted its affairs. If you should find, for instance, that a scientific institute—which was formed primarily for the promotion of science—has been so conducted that the advancement of the interests of its members has become one of its main purposes—as distinct from being merely subsidiary to the advancement of education—then it would cease to qualify for the benefits of the section: see the case of *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[15] by Lord Reid.

Again, Parliament does not limit the benefit to those organizations whose main objects are "charitable." It extends the benefit to those whose main objects are "otherwise concerned "with the advancement of religion, education or social welfare." This is a considerable extension on "charities" but is it an unlimited extension?

The principal question in this case, it seems to me, is whether, in order to obtain the benefit of the section, the main objects of the organization must be directed to the public benefit rather than to the private benefit of the individuals who make up the organization. Mr. Pennycuick argued that the words were so wide as to eliminate any necessity for public benefit. He laid stress on the words "or otherwise." He pointed to the words

[15] [1952] A.C. 631, 661; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

" the advancement of religion, education " in the section and said that trusts for those purposes are " charitable " if they are directed to the public benefit. If the words " or otherwise " are to be given any effect, he said, in regard to religion and education —over and above " charitable "—they must bring in organizations which are not directed to the public benefit. I cannot agree with this contention. I think the words " charitable or otherwise " give a colour, so to speak, to all the words that follow after them. The section cannot be read as if those words were left out—as if the only question were whether the main objects are " concerned " with the advancement of religion, education or social welfare." The main objects which are " otherwise " concerned must, I think, be objects that are akin to charitable objects—have some kindred quality with charitable objects. That is how Lord Buckmaster approached a similar problem in *Stag Line Ltd.* v. *Foscolo Mango & Co. Ltd.*[16] and I would approach the problem in the same way.

What, then, are the ways in which the main objects must be akin to charitable objects? The one thing that distinguishes charitable objects from all others is that they are for the good of the community, that is, for public rather than for private benefit: and, in order to qualify an organization for the relief given by the section, there must be present, I think, the concept of public benefit—wider, no doubt, than the somewhat limited interpretation put on it in the charity cases—but still it must be present. For this purpose the main objects must be altruistic—must be concerned with doing good for others rather than for yourself—for others, that is, who are outside your own circle of relatives and friends and to whom you are under no personal obligation. There is no need under this section to canvass the cases on what constitutes a section of the community for " charitable " purposes, such as *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[17] and *Inland Revenue Commissioners* v. *Baddely*,[18] in which there was a divergence of opinion among the judges. Suffice it to reach a conclusion on a general survey of the circumstances.

I am confirmed in this view by the other words in the section. Take the word " advancement " as used in the phrase " advance- " ment of education " ? The word " advancement " connotes, to my mind, the concept of public benefit. When a man teaches his own children their lessons, he is not concerned with the " *advancement* of education " but solely with the " education " of his children. But when a schoolmaster teaches the boys in a public school, he is concerned—with their education truly—but also with the " advancement of education " generally. I would not myself confine the " advancement of education " to the advancement of education as an end in itself or for its own sake—if that means the advancement of the theory of education as taught in a training college for teachers—or even if it means the

[16] [1932] A.C. 328, 334; 48 T.L.R. 127.
[17] [1951] A.C. 297.
[18] [1955] A.C. 572.

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advancement of mind training. "Education" means, I think, simply the educating of people either in general subjects or in particular subjects. But the "advancement" of education connotes public, as distinct from private, benefit. Likewise, the "advancement of religion" connotes the promotion of religion by spiritual teaching or by pastoral or missionary work among others outside one's own circle. When a man says his prayers in the privacy of his bedroom, he may truly be said to be concerned with religion but not with the "advancement of religion."

The words "social welfare" themselves also connote, to my mind, the concept of public benefit. These words comprehend many objects which are beneficial to the community but are not charitable according to the somewhat limited interpretation given in the charity cases. A person is commonly said to be engaged in "social welfare" when he is engaged in doing good for others who are in need—in the sense that he does it, not for personal or private reasons—not because they are relatives or friends of his—but because they are members of the community or of a portion of it who need help. The need may not be due to poverty. It may be due to the conditions of life of the persons concerned. They are usually people who are under a disadvantage compared to others more favourably placed—boys who need a youth club instead of running on the streets—people of small means who are given holidays in a home which they could not otherwise afford—working men who need a club where they can spend their leisure—and so forth. If a person is engaged in improving the conditions of life of others who are so placed as to be in need, he is engaged in "social welfare." But people who are engaged in improving their own conditions of life are not engaged in social welfare. If an organization is formed by public-spirited folk with the object of providing a boys' club—or a room for a women's institute—it is no doubt concerned with the advancement of social welfare: but if it is formed by a group of persons with the object of providing a social club for their own enjoyment or recreation, it is not. The difference between the two is that the main objects of the one are directed to the public benefit, whereas the others are not.

The Court of Appeal seem to have derived some help by writing, as it were, into the section, after the words "social wel-" fare," the phrase "as an end in itself or for its own sake." I find no special virtue in this phrase. It has for me no clear meaning. But if and in so far as it brings in the concept of public benefit, it brings into play the very distinction which is, I think, implied throughout the section.

It is this distinction which gives the clue to the deciding of the present case. I agree with Mr. Pennycuick that the main objects of this society are directed to social security—in the sense that the purpose is to enable people of small means to secure themselves against the risks which life holds for them—nevertheless I cannot see in its objects any element of public benefit.

The purpose is that each member should provide for his own security—by means of his contributions and deposits—just as other people do by insurance. No member is concerned with doing good for others. Each one is concerned with doing good for himself and his family. And the society exists so as to enable each member to do just that very thing. I entirely agree with all the judges in the courts below in holding that this is not charitable or otherwise concerned with the advancement of social welfare.

I would therefore dismiss this appeal.

LORD BIRKETT. My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack. In my opinion, the special facts are decisive of the two main points raised in this appeal, and show that the appellant society's organization is not established or conducted for profit, and that its main objects do not fall within the proper construction of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Appeal dismissed.

Solicitors: *Woolley, Tyler & Bury; Wrentmore & Son.*

F. C.

[COURT OF APPEAL.]

DEACOCK *v.* DEACOCK.

Husband and Wife—Maintenance—High Court—Death, presumption of, and dissolution of marriage—Decree in favour of husband—Wife not dead—Application by wife for maintenance—Whether distinction between "dissolution" and "divorce"—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 16, 19.
Husband and Wife—Divorce—Death.

A husband was granted a decree under section 8 of the Matrimonial Causes Act, 1937 (now section 16 of the Act of 1950 [1]) presuming the death of his wife and dissolving the marriage. She later learned of the decree and applied under section 19 (3) of the Act of 1950 for maintenance. On the question whether the court had jurisdiction to entertain the application:—

Held, that the court had jurisdiction since the words "decree for "divorce" in section 19 (3) included a decree "of dissolution of "marriage" granted under section 16. Notwithstanding that section 19 of the Act of 1950 refers to maintenance being granted on

[1] Matrimonial Causes Act, 1950, s. 16: "Any married person who "alleges that reasonable grounds "exist for supposing that the other party to the marriage is dead may, "if he is domiciled in England, pre- "sent a petition to the court to have "it presumed that the other party is "dead and to have the marriage dis- "solved, and the court, if satisfied "that such reasonable grounds exist, "may make a decree of presumption "of death and of dissolution of the "marriage."

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any decree "for divorce," whereas section 16 refers to a decree of presumption of death and "dissolution" of marriage, it was apt to refer to "divorce" when speaking of parties to the marriage bond, and "dissolution" when speaking of the bond itself.

Dictum of Pearce J. in *Wall* v. *Wall* [1950] P. 112, 121; 65 T.L.R. 731; [1949] 2 All E.R. 927 disapproved.

Appeal from Barnard J.

The parties were married in Greece in 1918, the husband, Walter Victor Deacock, being a British subject employed in the British consular service, and the wife, Honorine Evangeline, being a Greek national. They lived together in Athens until 1930, when the husband, having made the acquaintance of another Greek woman, left Greece with her and never went back to the wife or had any communication with her. He subsequently married the other woman. In 1943 the husband took proceedings in England to presume the death of the wife and for the dissolution of the marriage under section 8 of the Matrimonial Causes Act, 1937.[1] A final decree presuming the death of the wife and dissolving the marriage was granted. The wife in fact was still living in Greece and until 1951 had no knowledge of the above legal proceedings, the only effort made to give notice to her of the petition being an advertisement in the *News Chronicle* newspaper which, Greece being at that time occupied by the Germans, could not be obtained in Greece. The wife, having received no maintenance from the husband, was unable herself to finance legal proceedings but received advice and assistance from friends, and in 1955 obtained legal aid and issued a summons for maintenance against the husband.

The summons was dismissed by Barnard J. (affirming an order of the registrar) on the ground that it had not been brought in time.

By leave of the Court of Appeal the wife appealed on the ground that under section 19 (3) [2] of the Matrimonial Causes Act, 1950, the court had jurisdiction to grant an application for maintenance if, having regard to the circumstances of the case, it was made within a reasonable time after the decree.

J. B. Latey Q.C., *E. R. Moulton Barrett* and *J. B. Gardner* for the wife.

S. K. de Ferrars and *J. M. Rankin* for the husband.

The following cases were cited in argument: *Scott* v. *Scott* [3]; *Robertson* v. *Robertson* [4]; *Fisher* v. *Fisher* [5]; *Simmonds* v.

[1] For footnote 1 see p. 191.

[2] S. 19 (3): "On any decree for "divorce or nullity of marriage, the "court may, if it thinks fit, by order "direct the husband to pay to the "wife, during their joint lives, such "monthly or weekly sum for the "maintenance and support of the "wife as the court may think "reasonable."

[3] [1921] P. 107, 120, 124; 37 T.L.R. 158.

[4] (1883) 8 P.D. 94.

[5] [1942] P. 101; 58 T.L.R. 191; [1942] 1 All E.R. 438.

Simmonds [6]; *Hasting* v. *Hasting* [7]; *Shott* v. *Shott* [8]; *Wall* v. *Wall*.[9]

During the hearing of the appeal counsel for the husband contended that a distinction was drawn in the Matrimonial Causes Acts between dissolution of marriage and divorce, and that as section 19 of the Act of 1950 spoke of " divorce " and section 16 referred to " dissolution " of marriage there was no statutory power to apply for maintenance in the case of presumption of death.

The case is reported solely on that point.

HODSON L.J. stated the facts, and said that language had been used in certain cases which seemed to suggest that whether or not an application for maintenance had been made " on [the] decree " within section 19 (3) of the Matrimonial Causes Act, 1950, was a pure matter of discretion, whereas it was more accurately stated in *Scott* v. *Scott* [1] as being a question in each case of deciding whether the application was in truth made on the decree or within a reasonable time, having regard to all the circumstances of the case. His Lordship continued: A further point, which was not taken before the judge, but which has been taken in this court is that section 19 (3) of the Matrimonial Causes Act, 1950, following on the language of earlier Acts, speaks of a " decree for " divorce," and all the other sections to which we have been referred speak of decrees " for divorce," with the exception of section 16, which takes the place of section 8 of the Act of 1937 and which, having prescribed the remedy for a married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead, declares that a petition may be presented to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.

It is said (and I confess that this argument does not produce very much impact on my mind) that there is a distinction between the words " dissolution of marriage " and " divorce," and that, as section 19 contains the word " divorce " and section 16 does not, there is no statutory power to apply for maintenance at all in the case of presumption of death, the assumption contended for by counsel being that, since the person concerned is presumed to be dead, therefore (I suppose) they are dead and no application for maintenance is ever likely to be received from them. Of course, it does not in the least follow that because the courts presume a person to be dead that is a true fact—as this case demonstrates. In my view the word " dissolution " relates to the

[6] [1956] P. 47; [1955] 3 W.L.R. 129; [1955] 2 All E.R. 481.
[7] [1948] P. 68; 63 T.L.R. 564; [1947] 2 All E.R. 744.
[8] [1952] 1 T.L.R. 393; [1952] 1 All E.R. 735.
[9] [1950] P. 112; 65 T.L.R. 731; [1949] 2 All E.R. 927.
[1] [1921] P. 107; 37 T.L.R. 158.

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marriage bond itself, whereas the word " divorce " relates to the parties to the marriage bond; and it is apt to refer to " divorce " when speaking of parties and " dissolution " when speaking of the bond.

As the decree in this case shows, what has been done, or what has been purported to be done, by the court is to dissolve the marriage; and the word " dissolved " is used in this and in all other decrees, as it has been used for years: the word " divorce " is not used. The intention of the statute in providing this remedy of presumption of death appears to have been quite clear. It would not have been of any avail to declare that a man or woman was dead because that would not enable the other party to remarry unless they really were dead. So that it was added to the presumption to which the court could give effect that the court should dissolve the marriage; and that is what has happened in this case.

I confess that I cannot see any force in the argument, as so far stated, that there is no remedy by way of application for maintenance after a decree of this kind has been pronounced. The argument is supported by the language of section 16 (3) which provides: " Sections 10 to 13 of this Act shall apply to a petition " and a decree under this section as they apply to a petition for " divorce and a decree of divorce respectively "—thereby lending some verbal support to the argument that there is a distinction between a petition for dissolution and a petition for divorce. I accept that there is that verbal support for the argument; but the explanation of the reference to the preceding sections 10 to 13 of this Act seems to be that the legislature thought it well to draw attention to the fact that these sections would apply to these cases under section 16 although the opposite party to the marriage might be taken to be dead, and it had not, I suppose, occurred to the legislature that what happened in this case might often happen, namely, that the opposite party to the marriage might turn out to be alive, which might bring into operation, or which might provide the necessity of a litigant relying on, the succeeding sections of the statute, of which section 19, dealing with maintenance, is one.

I have not overlooked the fact that this argument has some support from a decision of Pearce J. in *Wall* v. *Wall*,[2] where the judge was considering the power to decree dissolution of marriage in connexion with the presumption of death. The point taken there was that the domicile of the applicant was not in this country, and the judge came to the conclusion that since the other party (who was in that case the husband) was, from the nature of the proceedings, supposed to be dead, it would be rather absurd to attach to his domicile any particular virtue as founding jurisdiction, and the residence of the wife herself was held to be sufficient. But in considering this question in support of his

[2] [1950] P. 112; 65 T.L.R. 731; [1949] 2 All E.R. 927.

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conclusion he referred [3] to section 8 (3) of the Act of 1937 (which was replaced by section 16 (3) of the Act of 1950) which provides that the earlier sections should apply to a decree under this section as they applied to a petition for divorce and a decree of divorce respectively. For the reasons which I have given, I confess that I cannot find myself in agreement with this part of the reasoning of the learned judge—although, of course, it does not mean that I am in any way dissenting from the conclusion which he reached in the case under consideration.

This second point is one which also fails, in my judgment; and the appeal should be allowed.

MORRIS L.J., agreeing that the right conclusion was that the application was made "on [a] decree" for divorce as the meaning of that phrase had been judicially determined, continued: I entirely agree that this appeal succeeds on the second point which has been debated in this court, though not formally taken before the judge. I am in full agreement with what my Lord has said, and I do not desire to add anything.

VAISEY J. I also fully agree with the conclusions at which my Lords have arrived. Nor do I think that I have any real ground of difference with any of the reasons which they have expressed in supporting that conclusion. How far the decision of what is a "reasonable time," having regard to the interpretation of the word "on" which the courts have given, involves the exercise of judicial discretion, is probably a question of words rather than of substance: but if and so far as that question has any substance I would myself desire to regard it as an open one.

Appeal allowed.

Solicitors: *J. A. H. Powell; Stoneham & Sons.*

A. W. G.

[3] [1950] P. 112, 121.

[PRIVY COUNCIL.]

J. C.*
1958
July 7.

LAURI JOSEPH NEWTON AND OTHERS . . APPELLANTS;
AND
COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia — Revenue — Income tax — Avoidance — Private company — Special dividend—Share transactions—"Arrangement" resulting

* *Present*: VISCOUNT SIMONDS, LORD TUCKER, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW, LORD DENNING.

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NEWTON v. COMMISSIONER OF TAXATION.

in increase of capital of company and capital payment to shareholders—Purpose and effect of avoiding liability for tax—"Absolutely void" as against commissioner—Penalty—"Arrangement"—"Purpose"—"Effect"—"Avoid"—Income Tax and Social Services Contribution Assessment Act, 1936–1951 (*Commonwealth*), *ss.* 226 (2), 260.

Revenue—Tax avoidance scheme.

By section 260 of the Commonwealth of Australia Income Tax and Social Services Contribution Assessment Act, 1936–1951: "Every contract, agreement, or arrangement . . . entered into, "orally or in writing, . . . shall so far as it has or purports to have "the purpose or effect of . . . (*c*) . . . avoiding any . . . liability "imposed on any person by this Act . . . be absolutely void as "against the commissioner . . ."

The appellants were the holders of 80,000 ordinary £1 shares in a private company (the motor company) which in December, 1949—and before December 31—amended its articles of association so as to entitle the shareholders to a special dividend of £5 15s. 10d. on every £1 share. After payment of that dividend those shares were to carry only a 5 per cent. fixed dividend. The special dividend would amount to nearly £460,000. The shareholders then sold the shares to another private company, the P. company, at a price of nearly £460,000—roughly equal to the anticipated special dividend. The P. company was only able to pay for the shares because of the special dividend it received on them.

The P. company also applied to the motor company for 400,000 5 per cent. preference £1 shares (freshly issued) and on the next day sold them to the original appellant shareholders for £400,000, that sum being paid by the appellants out of the £460,000 they had received for the 80,000 ordinary shares. Thus, by the end of December, 1949, the motor company had distributed £460,000 as special dividend, which had found its way back to the appellants, who had reinvested £400,000 of it as capital in the motor company and had kept £60,000 in cash. The P. company had received 80,000 £1 shares which, the future dividend being fixed at 5 per cent., were now worth only £80,000, and it sold them to a subsidiary company for that sum. The P. company, as a company which dealt in stocks and shares, was entitled for tax purposes to deduct losses on its deals from the dividends it received, and having bought the shares for £460,000 and sold them for £80,000, and incurred a loss of £380,000, was left with a net profit of only £80,000 on which it had to pay tax.

Similar transactions were carried out in the case of two other private motor companies in which the appellants also held the shares, and taking the transactions of all three companies together, the companies distributed £1,764,136 as special dividends, most of which found its way back to the appellants, who received £1,661,772 in cash, of which they had reinvested £1,185,631 as capital in the companies and kept £476,091 in cash. It was not disputed that all the transactions were genuine and intended to have their purported effect, and if accepted at their face value the appellants had disposed of their shares for a capital payment of £1,661,772, and had derived no income on which they could be taxed. On a claim by the Commissioner of Taxation, however, that within the meaning of section 260 of the Act there had been an "arrangement" which had or purported to have "the purpose "or effect" of "avoiding" a "liability imposed" by the Act, and that the special dividends amounting to £1,764,136 formed part of the assessable income of the appellants for the years ending June 30, 1950 and 1951:—

Held, that the transactions were an "arrangement" the purpose and effect of which was, inter alia, to increase the capital of the motor companies in a way which would attract as little tax as possible, and to enable the original shareholders—the appellants—to receive nearly £500,000 in cash without paying tax on it, and that looking at the arrangement as a whole it was caught by section 260. The whole of the transactions showed that there was concerted action to an end, and that one of the ends sought to be achieved was the avoidance of liability for tax. "As against "the commissioner," therefore, so far as it had that purpose and effect the arrangement was "absolutely void," and he was entitled completely to disregard it and ignore the transactions so far as they had that purpose and effect. He could ignore the arrangement in so far as the appellants transferred the special dividend rights (with the shares) to the P. company for money—for it was that transaction which gave the character of capital to the money received by the appellants, and when that transaction was ignored the special dividends were to be deemed for this purpose to be still held by the appellants, and the commissioner was entitled to treat them as income derived from the shares and taxable accordingly. Further, the appellants were liable to a penalty of over £600,000 which had been imposed on them by the commissioner under section 226 (2) of the Act.

"Arrangement" is apt to describe something less than a binding contract or agreement, but it must in section 260 comprehend not only the initial plan but also all the transactions by which it is carried into effect. "Purpose" means, not motive but the effect which it is sought to achieve—the end in view. "Effect" means the end accomplished or achieved. "Avoid" is used in its ordinary meaning—to "avoid a liability imposed" means to take steps to get out of the reach of a liability which is about to fall—not which has already fallen—on a person. The whole set of words denotes concerted action to the end of avoiding tax. To bring the arrangement within the section one must be able to predicate—by looking at the overt acts by which it was implemented—that it was implemented in that particular way to avoid tax. If the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section.

W. P. Keighery Pty. Ltd. v. *Commissioner of Taxation* (1958) Argus L.R. 97; *Deputy Federal Commissioner of Taxation* v. *Purcell* (1921) 29 C.L.R.(Aus.) 464; *Jaques* v. *Federal Commissioner of Taxation* (1924) 34 C.L.R.(Aus.) 328, and *Clarke* v. *Federal Commissioner of Taxation* (1932) 48 C.L.R.(Aus.) 56 considered.

Bell v. *Federal Commissioner of Taxation* (1953) 87 C.L.R. 548 approved.

Judgment of the Full Court of the High Court of Australia affirmed.

APPEAL (No. 7 of 1958), by special leave, from a majority judgment of the Full Court of the High Court of Australia (May 31, 1957), allowing an appeal by the respondent, the Commissioner of Taxation, from a judgment of the High Court in its original jurisdiction (August 15, 1956) which had allowed appeals by the appellant taxpayers against amended assessments of income tax for the years of income ended June 30, 1950 and 1951.

The following facts and statutory provisions are taken from the

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judgment of the Judicial Committee: The question in this case was: What was the assessable income of the appellants for the years which ended on June 30, 1950, and June 30, 1951? In particular, did it include certain sums declared by three companies as special dividends amounting in all to £1,764,136? The matter had given rise to considerable difference of opinion in the High Court of Australia. Kitto J., who heard the case at first instance, decided that those sums did not form part of the assessable income of the appellants. But the Full Court, by a majority, consisting of Dixon C.J., McTiernan, Williams and Fullagar JJ. (with Taylor J. dissenting), held that it did form part of the assessable income of the appellants and that they must pay tax on it and also a penalty. Very large sums of money were involved.

In the autumn of 1949 the position was that three private companies, Lanes Motors Pty. Ltd., Neals Motors Pty. Ltd. and Melford Motors Pty. Ltd. (which dealt in motor-cars), had made large profits and were still making them. Under Australian law those profits would ordinarily be liable to a heavy tax. If they were distributed to the shareholders (the appellants) as dividends in cash or as bonus shares, the shareholders—being wealthy persons—would be liable to pay tax at the rate of 15s. in the pound. If the profits were not distributed to the shareholders by December 31, 1949, but kept in the coffers of the company, the company would be liable—under Division 7 of the Act—to pay the tax which the shareholders would have paid, that was, at 15s. in the pound.

In December, 1949—before the last day—several transactions took place. For simplicity, what happened in the case of one of the private motor companies only will be considered: but all three carried out similar transactions. The company amended its articles of association so as to give special dividend rights to 80,000 ordinary £1 shares, which entitled the holders of the shares to a dividend of £5 15s. 10d. on every £1 share. That came to a total of nearly £460,000 as special dividend. After the payment of that dividend, those shares were to carry only a 5 per cent. fixed dividend. The original shareholders then sold those shares to a company called Pactolus Limited (which was a private company controlled by a consulting accountant) at a price of nearly £460,000—roughly equal to the anticipated dividend. The Pactolus company paid to the original shareholders the price by cheque, and at about the same time received from the motor company a cheque for the special dividend. The two cheques were for about the same amount—£460,000. The Pactolus company was only able to pay for the shares because of the special dividend it received on them.

The Pactolus company also applied to the motor company for 400,000 5 per cent. preference shares (freshly issued) and paid for them by a cheque in favour of the motor company for £400,000. On the next day the Pactolus company sold those

400,000 shares to the original shareholders (from whom they had bought the 80,000 ordinary shares) at a price of £400,000. The original shareholders paid that sum, by cheque in favour of the Pactolus company, out of the £460,000 they had received for the 80,000 ordinary shares.

All the cheques in the above transaction were banked simultaneously, with the result that by the end of December, 1949, the motor company had distributed £460,000 as special dividend. That had found its way back to the original shareholders who had received £460,000, of which they had reinvested £400,000 as capital in the company and kept £60,000 in cash. The Pactolus company had received 80,000 shares on which it was thenceforward only entitled to a fixed dividend of 5 per cent. Those were now worth £80,000, and the Pactolus company sold them to a subsidiary company for that sum in cash.

The Pactolus company was, of course, liable to pay tax on the special dividends it received: but it was a company dealing in stocks and shares, and as such it was entitled to deduct losses on its deals from the dividends it received. On the purchase and resale of the shares it had made a loss. It had bought the shares for £460,000 and sold them for £80,000—a loss of £380,000. That loss could be set against the special dividend which it had received of £460,000, leaving it with a net profit of only £80,000 on which it had to pay tax.

So much for the one company. Taking the transactions of all three companies together the result at the end of it all was that the motor companies distributed £1,764,136 as special dividends. Most of that found its way back to the original shareholders, who received £1,661,772 in cash, of which they had reinvested £1,185,631 as capital in the companies and kept £476,091 in cash. The Pactolus company had received 161,213 shares on which it was thenceforward entitled to a fixed dividend of 5 per cent. The Pactolus company had also retained £102,404 in cash.

It was not disputed that all the transactions were genuine and not shams. They were all intended to have the effect they purported to have. If the commissioner was bound to accept them at their face value, then the shareholders had disposed of their shares for a capital payment of £1,661,772. They had derived no income and were not liable to tax thereon. If the transactions were to be questioned, it could only be by virtue of section 260 of the Commonwealth Income Tax and Social Services Contribution Assessment Act, 1936–1951. It was in these terms: "Every contract, agreement, or arrangement "made or entered into, orally or in writing, whether before or "after the commencement of this Act, shall so far as it has or "purports to have the purpose or effect of in any way, directly "or indirectly—(*a*) altering the incidence of any income tax; "(*b*) relieving any person from liability to pay income tax or make "any return; (*c*) defeating, evading, or avoiding any duty or "liability imposed on any person by this Act; or (*d*) preventing

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" the operation of this Act in any respect, be absolutely void, as " against the commissioner, or in regard to any proceeding under " this Act, but without prejudice to such validity as it may have " in any other respect or for any other purpose."

The Commissioner of Taxation said that the section covered this case because there was, he said, an " arrangement " which had or purported to have " the purpose or effect " of " avoiding " a " liability imposed " on any person by the Act.

1958. May 5, 6, 7, 8, 12. *Sir Garfield Barwick Q.C., R. M. Eggleston Q.C., J. A. Nimmo Q.C.* (all of Australia) and *Robert Gatehouse* for the appellants.

J. B. Tait Q.C., Douglas I. Menzies Q.C. and *K. A. Aickin Q.C.* (all of Australia) for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In the Estate of William Vicars, decd.*[1]; *Commissioner of Taxation* v. *Sidney Williams (Holdings) Ltd.*[2]

July 7. The judgment of their Lordships was delivered by LORD DENNING who, after stating the decisions of the courts below, continued: In these days, when rates of tax are high, it is natural enough for a man to seek so to order his affairs that the tax attaching under the appropriate Acts is less than it otherwise would be. In England there is no general provision against it, but special provisions have been enacted so as to counter particular devices and to deal with particular situations. In Australia there is a general provision which is said to cover " tax " avoidance," and it comes now before their Lordships for the first time. But before setting out the section, their Lordships think it better to summarize the facts which give rise to the question.

[His Lordship stated the facts as set out above and continued:] Sir Garfield Barwick, for the taxpayers, submitted to their Lordships that section 260 had no application to this case. He put in the forefront of his argument two submissions which were not made to the High Court of Australia. First, Sir Garfield Barwick submitted that the section was of no effect at all. He referred to the history of the section and pointed out that before 1936 the words " as against the commissioner " were not there. He said that in those days the section had only a social effect—an effect as between two or more subjects—not allowing one of them to put on to another the duty to make a return of tax or to bear it, and so forth. It had, he said, no fiscal effect—no effect, that is, as against the commissioner. Then in 1936, by inserting the words " as against the commissioner," the section was deprived of any effect as between subjects: and, as it already had no effect as against the commissioner, it had thenceforward no

[1] (1944) 45 S.R.(N.S.W.) 85. [2] (1958) Argus L.R. 108.

effect at all. The insertion of those words, he said, stultified the section. Their Lordships cannot accept this argument. They are quite clearly of opinion that long before 1936 the section had a fiscal effect. Its principal effect was to avoid transactions as against the commissioner—as in cases such as *Clarke* v. *Federal Commissioner of Taxation*.[1] But it had—as originally drafted—an unexpected effect in that in *De Romero* v. *Read*[2] it was held to avoid a transaction between subjects. It seems to their Lordships that the reason for the insertion of the words "as against the commissioner" was to do away with the decision in *De Romero* v. *Read*.[2]

Next, Sir Garfield Barwick submitted that in section 260 (*c*) the words "liability imposed on any person" meant a liability which had already accrued: and that "avoid" meant displace. He said that in order that an arrangement should be avoided, it must be an arrangement which sought to displace a liability which had already come home to a taxpayer—in respect of income which had already been derived by him. Their Lordships cannot accept this submission. They are clearly of opinion that the word "avoid" is used in its ordinary sense—in the sense in which a person is said to avoid something which is about to happen to him. He takes steps to get out of the way of it. It is this meaning of "avoid" which gives the clue to the meaning of "liability imposed." To "avoid a liability imposed" on you means to take steps to get out of the reach of a liability which is about to fall on you. If the submission of Sir Garfield Barwick were accepted, it would deprive the words of any effect: for no one can displace a liability to tax which has already accrued due, or in respect of income which has already been derived. Their Lordships notice that, although this point was not raised in the High Court, Taylor J. did consider it, and they find themselves in agreement with what he said upon it.

So much for Sir Garfield Barwick's new arguments. Their Lordships turn to consider the other points raised in the case. Their Lordships are of opinion that the word "arrangement" is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons—a plan arranged between them which may not be enforceable at law. But it must in this section comprehend, not only the initial plan but also all the transactions by which it is carried into effect—all the transactions, that is, which have the effect of avoiding taxation, be they conveyances, transfers or anything else. It would be useless for the commissioner to avoid the arrangement and leave the transactions still standing. The word "purpose" means, not motive but the effect which it is sought to achieve—the end in view. The word "effect" means the end accomplished or achieved. The whole set of words denotes concerted action to an end—the end of avoiding tax.

But, said Sir Garfield, if such a wide interpretation is given to

[1] (1932) 48 C.L.R.(Aus.) 56. [2] Ibid. 649.

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the words, where is the section to stop? Does it enable the commissioner to avoid all transactions by which a man seeks to escape a liability to tax which is about to fall on him? He gave numerous illustrations to show that the Parliament of Australia cannot have intended so sweeping a result. Take the case of a man who sells shares cum dividend—because he does not wish to pay the tax on the dividend when received: or of a private company which is turned into a non-private company in order to escape Division 7 tax: and so forth. Can the commissioner go behind those transactions?

The answer to the problem seems to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every "contract, agreement or "arrangement" (which their Lordships will henceforward refer to compendiously as "arrangement") which has the purpose or effect of avoiding tax. In applying the section you must, by the very words of it, look at the arrangement *itself* and see which is *its* effect—which *it* does—irrespective of the motives of the persons who made it. Williams J. put it well when he said: "The purpose of a contract, agreement or arrangement must be "what *it* is intended to effect and that intention must be ascer- "tained from its terms. Those terms may be oral or written or "may have to be inferred from the circumstances but, when they "have been ascertained, their purpose must be what they effect." In order to bring the arrangement within the section you must be able to predicate—by looking at the overt acts by which it was implemented—that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. Thus, no one, by looking at a transfer of shares cum dividend, can predicate that the transfer was made to avoid tax. Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Division 7 tax: see *W. P. Keighery Pty. Ltd.* v. *Commissioner of Taxation*.[3] Nor could anyone, on seeing a declaration of trust made by a father in favour of his wife and daughter, predicate that it was done to avoid tax: see *Deputy Federal Commissioner of Taxation* v. *Purcell*.[4] But when one looks at the way the transactions were effected in *Jaques* v. *Federal Commissioner of Taxation*,[5] *Clarke* v. *Federal Commissioner of Taxation*[6] and *Bell* v. *Federal Commissioner of Taxation*[7]—the way cheques were exchanged for life amounts and so

[3] (1958) Argus L.R. 97.
[4] (1921) 29 C.L.R.(Aus.) 464.
[5] (1924) 34 C.L.R.(Aus.) 328.
[6] (1932) 48 C.L.R.(Aus.) 56.
[7] (1953) 87 C.L.R.(Aus.) 548.

forth—there can be no doubt at all that the purpose and effect of that way of doing things was to avoid tax.

Applying these principles to the present case, the first question is—Was there an arrangement? The answer is "Yes." The whole complicated series of transactions must have been the result of a concerted plan; and the nature of the plan is to be ascertained by the overt acts done in pursuance of it.

Next, what was the purpose of the arrangement? It can clearly be seen to be three-fold: (i) To increase the capital of the motor companies—and to do it by ploughing back over £1,000,000 of the profits into the business—and to do it in a way which would attract as little tax as possible. (ii) To enable the original shareholders to receive a large sum—nearly £500,000 in cash—without paying tax on it. (iii) To enable the Pactolus company to make a handsome profit in return for its part in the affair (It is to be noticed that—in so far as it was the purpose of the transaction to let the motor companies escape from the additional tax under Division 7—this could have been effected by turning the motor companies into non-private companies.)

Finally, what was the effect of the arrangement? It was this: (i) The motor companies received new capital of £1,185,631—of which they were much in need for the conduct of their businesses. (ii) The original shareholders received a capital payment of £1,661,772 in return for the sale of shares, but had received no dividend on which they could be taxed. (iii) The motor companies distributed a dividend of £1,764,136 which was a sufficient distribution to enable them to avoid being liable for tax on undistributed profits under Division 7. (iv) The Pactolus company made a profit on its share dealings. It had received 161,213 £1 shares; and it had also £102,404 in cash on which it was liable to pay tax.

It is clear from this analysis that the avoidance of tax was not the *sole* purpose or effect of the arrangement. The raising of new capital was an associated purpose. But nevertheless the section can still work if one of the purposes or effects was to avoid liability for tax. The section distinctly says "*so far* as it has" the purpose or effect. This seems to their Lordships to import that it need not be the sole purpose.

Looking at the whole of this arrangement, their Lordships have no doubt that it was an arrangement which is caught by section 260. The whole of the transactions show that there was concerted action to an end—and that one of the ends sought to be achieved was the avoidance of liability for tax.

This question then arises: What is the effect of section 260 on that arrangement? It is quite clear that nothing is avoided as between the parties but only as against the commissioner. As against him the arrangement is "absolutely void" so far as it has the purpose or effect of avoiding tax. This is not a very precise use of the words "absolutely void." Ordinarily, if a transaction is absolutely void, it is void as against all the world.

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In this case what is meant is that the commissioner is entitled completely to disregard the arrangement—and the ensuing transactions—so far as they have the purpose or effect of avoiding tax. In the words of the courts of Australia, it is an "annihilating" provision—the commissioner can use the section so as to ignore the transactions which are caught by it. But the ignoring of the transactions—or the annihilation of them—does not itself create a liability to tax. In order to make the taxpayers liable, the commissioner must show that moneys have come into the hands of the taxpayers which the commissioner is entitled to treat as income derived by them. Their Lordships agree with the way in which Fullagar J. put it in his judgment: "Section 260 alters "nothing that was done as between the parties. But, for the "purposes of income tax, it entitles the commissioner to look at "the end result and to ignore all the steps which were taken in "pursuance of the avoided arrangement."

In this case the commissioner must accept the arrangement in so far as it had the effect of creating special dividend rights in the original shareholders—for that did nothing to avoid tax: but he can ignore the arrangement in so far as the original shareholders transferred those dividend rights (with the shares) to Pactolus for money—for it was that transaction which gave the character of capital to the money received by the shareholders. When that transaction is ignored, it becomes apparent that special dividends were declared on shares which are to be deemed for this purpose to be still held by the original shareholders. Those dividends amount to £1,764,136 paid out by the company. If and so far as the commissioner can show that those special dividends reached the hands of the original shareholders, he is entitled to treat it as income derived by them from the shares. Now the commissioners can trace the sum of £1,661,772 in cash actually into the hands of the original shareholders. He is entitled, therefore, to treat it as income derived by them. He cannot trace the balance of £102,404 actually into their hands. It remained in the pocket of Pactolus Limited. It was ostensibly the profit of Pactolus on buying the shares. But when the transfer is ignored, that profit is seen to be nothing more nor less than remuneration which the original shareholders allowed Pactolus to retain for services rendered. The position is the same as if the shareholders had received it as part of the special dividend and then returned it to Pactolus as remuneration. The commissioner can therefore treat this £102,404 also as income derived by the shareholders.

The commissioner cannot avoid or ignore the taking up of 400,000 £1 preference shares: for that did nothing to avoid tax. Nor can he avoid or ignore the fact that Pactolus now holds 161,213 shares shorn of special dividend rights—because that does nothing to avoid tax. He can only avoid or ignore the transfer in so far as it transferred the special dividend rights.

In the course of the argument Sir Garfield Barwick submitted

that *Bell's* case [8] was wrongly decided. In the opinion of their Lordships it was rightly decided, and the exposition of the law there given by the High Court of Australia is a valuable guide to the true understanding of the section.

Sir Garfield Barwick sought to raise before their Lordships a further point which was not raised below. The commissioner assessed the shareholders in the tax due on the moneys received by them—and in addition included a sum as a penalty under section 226 (2) of the Act. This penalty amounts to over £600,000. Sir Garfield sought to say that section 226 (2) did not apply because the taxpayer could not properly be said to have "omitted" the income from his return—seeing that it was not income when he received it or when he made his return—but only has become so ex post facto when the commissioner decided to treat it so. Their Lordships were not disposed to allow Sir Garfield to raise this point as it had not been raised before and does not appear in the case of the appellants—but in any case they think it is a bad point. In the events that have happened, the money has been determined to be assessable income. As such it ought to have been included—and was not. The taxpayer is therefore liable to the penalty.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

Solicitors: *A. F. & R. W. Tweedie; Coward, Chance & Co.*

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[8] 87 C.L.R.(Aus.) 548.

[CHANCERY DIVISION.]

RIGDEN *v.* WHITSTABLE URBAN DISTRICT COUNCIL.

1958
June 27.

Danckwerts J.

[1957 R. 1742.]

Practice—Originating summons—Construction question—Jurisdiction—Person "interested under . . . written instrument"—"Claiming "any legal or equitable right"—Town and Country Planning—Enforcement notice—Validity—Originating summons for declaration that notice invalid—Whether correct procedure—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 23—*R.S.C., Ord.* 54A, *rr.* 1, 1A.

Town and Country Planning—Enforcement notice—Form—Validity—Originating summons for declaration that notice invalid—Whether correct procedure—Town and Country Planning Act, 1947, *s.* 23—*R.S.C., Ord.* 54A, *rr.* 1, 1A.

A local authority served on R. an enforcement notice dated September 27, 1957, under section 23 of the Town and Country

[Reported by JENNIFER WEST, Barrister-at-Law.]

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Planning Act, 1947,[1] to discontinue on or before November 7, 1957, the use of his land as a caravan site, and to restore it to agricultural land. The notice was stated to take effect on October 31, 1957.

By originating summons taken out under R.S.C., Ord. 54A,[2] R. claimed a declaration that the enforcement notice did not comply with the provisions of section 23, since if he appealed against the notice, the time within which he was required to restore his land would have expired before he had heard the outcome of the appeal, and that the notice was, accordingly, null and void:—

Held, that this was not a proper case for application by originating summons, since R. was merely interested to show that the notice was invalid and was not a person "interested under a "written instrument" within the meaning of Ord. 54A, r. 1, nor was he "claiming any legal or equitable right" which depended on the construction of the Act within the meaning of Ord. 54A, r. 1A.

ADJOURNED SUMMONS.

By originating summons under R.S.C., Ord. 54A, George

[1] Town and Country Planning Act, 1947, s. 23: " . . . (2) Any "notice served under this section "(hereinafter called an 'enforcement "'notice') shall specify the develop- "ment which is alleged to have been "carried out without the grant of "such permission as aforesaid or, as "the case may be, the matters in "respect of which it is alleged that "any such conditions as aforesaid "have not been complied with, and "may require such steps as may be "specified in the notice to be taken "within such period as may be so "specified for restoring the land to "its condition before the development "took place, or for securing com- "pliance with the conditions, as the "case may be; and in particular any "such notice may, for the purpose "aforesaid, require the demolition or "alteration of any buildings or "works, the discontinuance of any "use of land, or the carrying out "on land of any building or other "operations. (3) Subject to the provi- "sions of the next following subsec- "tion, an enforcement notice shall "take effect at the expiration of such "period (not being less than 28 days "after the service thereof) as may be "specified therein: Provided that— "(*a*) if within the period aforesaid an "application is made to the local "planning authority under this Part "of this Act for permission for the "retention on the land of any build- "ings or works, or for the continuance "of any use of the land, to which "the enforcement notice relates, the "notice shall be of no effect pending "the final determination of that "application, and if such permission "as aforesaid is granted on that "application, the notice shall not take "effect; (*b*) if within the period "aforesaid an appeal is made to the "court under the following provisions "of this section by a person on "whom the enforcement notice was "served, the notice shall be of no "effect pending the final determina- "tion or withdrawal of the appeal. "(4) If any person on whom an "enforcement notice is served under "this section is aggrieved by the "notice, he may, at any time within "the period mentioned in the last "foregoing subsection, appeal against "the notice to a court of summary "jurisdiction for the petty sessional "division or place within which the "land to which the notice relates is "situated. . . . (5) Any person "aggrieved by a decision of a court "of summary jurisdiction under the "last foregoing subsection may appeal "against that decision to a court of "quarter sessions."

[2] R.S.C., Ord. 54A, r. 1: "In "any Division of the High Court, "any person claiming to be interested "under a deed, will, or other written "instrument may apply by originat- "ing summons for the determination "of any question of construction "arising under the instrument, and "for a declaration of the rights of the "persons interested."

R. 1A: "In any Division of the "High Court any person claiming "any legal or equitable right in a "case where the determination of the "question whether he is entitled to "the right depends upon a question "of construction of a statute, may "apply by originating summons for "the determination of such question "of construction, and for a declara- "tion as to the right claimed."

Rigden (hereinafter called " the plaintiff ") asked for a declaration against the Whitstable Urban District Council (hereinafter called " the council ") that an enforcement notice served by them upon him was null and void and of no effect, since it did not comply with section 23 of the Town and Country Planning Act, 1947.

The plaintiff had been and still was using his property known as " Limberlost," Church Lane, Seasalter, Whitstable, Kent, which had previously been agricultural land, as a caravan park and site. Under section 12 (2) of the Act which requires permission to be given for any such development carried on after July 1, 1947, the council, as the planning authority for the district under powers delegated to them by Kent County Council with the consent of the Minister of Housing and Local Government, served the said enforcement notice upon him. Such notice under section 23 was required to take effect not less than 28 days from the service thereof and was subject to right of appeal to a court of summary jurisdiction. The notice served on the plaintiff was dated September 27, 1957, and required him to discontinue the use of his land as a caravan park and camp on or before November 7, 1957, and to restore it to agricultural land. It stated finally that it would take effect on October 31, 1957.

The plaintiff claimed that the notice was void since it took no account of the fact that, if there was an appeal by him, the period within which the notice took effect might be suspended, and in that event the period within which the land was required to be restored would have expired before the outcome of any such appeal could be known. Accordingly, he applied by originating summons as the convenient and appropriate method of determining the validity of the notice in order that he might know his position in relation to section 23.

F. H. B. W. Layfield for the plaintiff.
Denys Buckley for the council.

DANCKWERTS J., after stating the facts, continued: It is contended that the notice is bad, to put it shortly, because it takes no account of the fact that the period within which the notice would take effect might be suspended if there was an appeal against the notice, and in that event the period within which the land was required to be restored by the notice would have expired before the period within which the notice takes effect had come to an end. The object of this application is to get a declaration from the court that that notice fails to comply with the provisions of section 23 of the Town and Country Planning Act, 1947, and is, accordingly, null and void and of no effect. It is claimed that the validity of the notice cannot be decided by the court of summary jurisdiction, or quarter sessions on an appeal against the notice (*Mead* v. *Chelmsford Rural District Council* [1]),

[1] [1953] 1 Q.B. 32, 36, 37; [1952] 2 All E.R. 723.

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and so it is contended that this is a convenient and appropriate method of determining the validity of the notice. The owner of the land naturally wants to know his position in relation to section 23 of the Act.

The rule has to be considered to see whether this application falls within it. [His Lordship read Ord. 54A, rr. 1 and 1A, and continued:]

I have come, with some reluctance, to the conclusion that the plaintiff cannot bring himself within the terms of either of those rules. It is perfectly true that he is interested in the question of the validity of the notice, and it may be true that the question of the validity of the notice depends on the proper construction of the statute, but the jurisdiction conferred by Order 54A is very restricted, and if it does not fall within the terms of the rules, I have no power, whatever I would like to do, to consider the application. I do not think that the plaintiff can be said to be a person "interested under a deed, will, or other written "instrument" within the meaning of rule 1, since he cannot really be interested under a notice; he is merely interested in trying to show that the notice is invalid and does not comply with the Act. Again, with regard to rule 1A, he is not "claiming "any legal or equitable right," which depends upon a question of the construction of the statute. Although there might be a question depending on the true interpretation of section 12 and the exercise by the planning authority of its powers conferred by the Act, it is not, I think, a matter which can be said to be raised by the validity of a notice. Such a notice is merely an enforcement notice served by the planning authority for the purpose of securing compliance with the order of the planning authority because of the failure of the landowner to obtain the necessary permission. It does not seem to me that he is claiming any legal or equitable right which depends on the construction of the notice, and therefore I have most reluctantly come to the conclusion that I am not in a position to entertain this application, and it must be dismissed.

Declaration accordingly.

Solicitors: *Balderston, Warren & Co. for Wild & Son, Whitstable; Sharpe, Pritchard & Co. for R. H. Kealey, Deputy Town Clerk, Whitstable.*

[QUEEN'S BENCH DIVISION.]

STONE *v.* BOREHAM.

1958
July 2, 3.

Lord Goddard C.J., Slade and Devlin JJ.

Shop—Sunday closing—Mobile shop—Whether part of road where van standing a "place" where retail trade carried on—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *ss.* 47, 58, 74 (1).

The defendant was the owner of a motor-van equipped as a mobile shop. On Sunday, November 10, 1957, he stopped his van outside a house and sold a packet of tea to a customer. He was charged with carrying on retail trade at a place—being that part of a road situate outside the house—on a Sunday contrary to sections 47 and 58 of the Shops Act, 1950[1]:—

Held, that (applying *Eldorado Ice Cream Co. Ltd.* v. *Keating* [1938] 1 K.B. 715; 54 T.L.R. 356; [1938] 1 All E.R. 330) the van was not a "place" where retail trade was being carried on within section 58 of the Act of 1950; and that it would be wholly fanciful to distinguish that case from the present by holding that the ground on which the van stood was such a place; accordingly, the defendant was not guilty of an offence.

Per Devlin J. The requirement of closure in section 47 makes it plain that the "place" referred to in section 58 is something which is fixed and not a place where a casual sale happens to be effected.

CASE STATED by East Suffolk justices sitting at Woodbridge.

On December 23, 1957, an information was preferred by the prosecutor, Oswald John Stone, against the defendant, Keith Ramon Boreham, that he on November 10, 1957, at Woodbridge in the County of East Suffolk, being the person then carrying on retail trade or business at a certain place being that part of Peterhouse Crescent, Woodbridge, situate outside the dwelling-house numbered 106 Peterhouse Crescent did not close the said place for the serving of customers on that day being a Sunday in that he did sell a packet of tea at the place, that not being one of the transactions mentioned in the Fifth Schedule to the Shops Act, 1950, contrary to sections 47 and 58 of that Act.

The justices heard the information on January 9, 1958, and found the following facts:

The prosecutor was a Shops Act inspector authorized to institute proceedings on behalf of the East Suffolk County Council for offences under the Shops Act, 1950. The defendant, a retailer, was the owner of an Austin motor-van which was equipped as a mobile shop and was stocked with a variety of goods, including groceries and ice cream, for sale by retail by the defendant to

[1] Shops Act, 1950, s. 47: "Every "shop shall, save as otherwise pro- "vided by this Part of this Act, be "closed for the serving of customers "on Sunday."

S. 58: "The foregoing provisions "of this Part of this Act . . . shall "extend to any place where any retail "trade or business is carried on as if "that place were a shop, and as if in "relation to any such place the per- "son by whom the retail trade or "business is carried on were the "occupier of a shop."

S. 74 (1): "'shop' includes any "premises where any retail trade or "business is carried on."

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members of the public. On Sunday, November 10, 1957, in the course of his trade or business, the defendant drove the van slowly along Clare Avenue and Peterhouse Crescent, Woodbridge, which was part of his normal Sunday round in the van. He advertised the presence of the van by means of musical chimes and he stopped the van at frequent intervals. Soon after 4.30 p.m. the defendant stopped the van in the roadway outside No. 106 Peterhouse Crescent, where he sold by retail and delivered a packet of tea to a customer, who stood in the roadway and was served from the van. The defendant, who admitted the sale, sold the goods on Sundays because he understood that the provisions of the Shops Act, 1950, did not apply to mobile shops.

It was contended on behalf of the prosecutor that the part of Peterhouse Crescent which was occupied by the stationary van at the time of the sale was a place within the meaning of section 58 of the Act of 1950; that the defendant was carrying on a retail trade or business at that place, and that he was therefore guilty of the offence charged.

It was contended on behalf of the defendant that the portion of the road occupied by the stationary van was not a place within section 58; that the sale was effected in the van and not in the roadway and that the van was not a place within the meaning of the section; that the defendant was therefore not guilty of an offence.

The justices were of opinion, having regard to the decision in *Eldorado Ice Cream Co. Ltd.* v. *Keating*,[2] that: (a) A place within the meaning of section 58 of the Act of 1950 must be premises akin to a shop; that section 74 provides that "'shop' includes any "premises where any retail trade or business is carried on."

(b) It was alleged that the offence was that retail trade or business was carried on on an undefined portion of the public highway and that that place was not closed for the serving of customers on a Sunday. It was not alleged that the mobile van while temporarily stationary was a place within the meaning of the Act in view of the decision in the *Eldorado* case.

(c) On the facts found the charge as contained in the information against the defendant could not be sustained.

The prosecutor appealed.

L. K. E. Boreham and *Mark Dyer* for the prosecutor.
C. J. Crespi for the defendant.

The cases cited in argument are referred to in the judgment.

LORD GODDARD C.J. This matter came before a lay bench of magistrates at Woodbridge, and I pay tribute to the care they gave to the case. I have come to the conclusion that their decision was right. [His Lordship referred to the magistrates' decision and continued:] I have no doubt that as the Shops Act, 1950,

[2] [1938] 1 K.B. 715; 54 T.L.R. 356; [1938] 1 All E.R. 330.

was intended to prohibit and regulate Sunday trading, it might be a very good thing from the public point of view if it could be said that these mobile vans came within the Act. The shopkeeper has to close his shop on Sundays and if the owner of a mobile van can go round and sell from his van it may be that that is unfair competition and undesirable, but that is not a matter for this court. We have to see whether on the construction of the Act and the cases which are binding on this court an offence has been committed.

The various Shops Acts are consolidated in the Shops Act, 1950, and that is the Act which we have to construe. Section 47 provides: "Every shop shall save as otherwise provided by this "Part of this Act, be closed for the serving of customers on "Sunday." Section 74, which is the definition section, provides: "'shop' includes any premises where any retail trade "or business is carried on." Observe that that is not a precise definition; it says that it "includes" certain premises and does not therefore exclude other matters. Section 58 provides: "The "foregoing provisions of this Part of this Act . . . shall extend "to any place where any retail trade or business is carried on as "if that place were a shop, and as if in relation to any such place "the person by whom the retail trade or business is carried on "were the occupier of a shop."

I say at once, both with regard to the definition of "shop" in section 74 and section 58, that the effect of those sections is not to say that a retail trade or business is carried on in a mobile shop. At a mobile shop no doubt retail sales are made, but that is different from saying that a retail trade or business is carried on. A man carries on business from an address. I do not think those words apply to a mobile van of this sort. It is unnecessary to examine in detail the various Shops Acts or the Scottish cases on this subject, because in my opinion the decision of this court in *Eldorado Ice Cream Co. Ltd.* v. *Keating* [1] on which the justices relied is binding on us. Whether, if the case was res integra, we might come to a different decision I need not inquire. In the *Eldorado* case, which was decided under the Shops (Sunday Trading Restriction) Act, 1936, a box-tricycle from which ice-cream is sold, was attacked as a retail shop, and there is no difference between a mobile van and a tricycle. The distinction sought to be drawn here is that, whereas the court held in the *Eldorado* case that the tricycle could not be a shop within the definition or extension section in the Act, it left open the question whether a place, that is to say, the actual piece of ground upon which the tricycle stood, could be held to be a shop. That is why, as Mr. Boreham in his very well-sustained argument told us the information in the present case charged the defendant with selling from a place, which was the piece of ground in front of a house in the street. It seems to me that that is not a place

[1] [1938] 1 K.B. 715; 54 T.L.R. 356; [1938] 1 All E.R. 330.

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where the defendant had set up business or had established himself as people do at the side of a road on Sundays where they put out a table and sell flowers or fruit. It was simply the place where he stopped, and it would be fanciful to distinguish the present case from the *Eldorado* case on the ground that the *Eldorado* case was dealing with a charge which alleged that a man sold from a tricycle and in this case it is said he sold from a place, namely, where the tricycle or van stopped. We must try to construe these matters in a way which the public can understand. The *Eldorado* case clearly decides that a moving vehicle such as a tricycle is not brought within the provisions of this Act, and therefore it would be wholly artificial to say that the place at which a tricycle comes to a stand is brought within the Act. No doubt the appropriate Government Department which has to deal with these matters may take into account that this court holds that these mobile shops are not within the Shops Act, 1950, in consequence of the decision in the *Eldorado* case in 1938 after which the law could have been altered when the Shops Act, 1950, was passed.

For these reasons, I am of opinion that the justices were right in holding that they were constrained by the *Eldorado* case to hold that an offence had not been committed and that therefore this appeal fails and must be dismissed.

Slade J. I agree that this appeal fails because this court is bound by the decision of the Divisional Court in *Eldorado Ice Cream Co. Ltd.* v. *Keating*.[2] I respectfully agree with my Lord that it would be too fanciful to draw a distinction between a box tricycle and the land on which the box tricycle stood at the time the retail sale was effected, and of course the same applies in this case to a motor-van. Had the matter been res integra, I am bound to say that I should have come to a different conclusion. Section 47 of the Shops Act, 1950, provides: "Every shop shall "save as otherwise provided by this Part of this Act, be closed "for the serving of customers on Sunday." A shop is defined by section 74 (1) as including any premises where any retail trade or business is carried on. In a sense, therefore, the expression "shop" may be said to be linked to the word "premises." Then one has section 58 of the Act of 1950, the rubric of which is: "Extension of foregoing provisions of Part IV to retail trading "elsewhere than in shops," and that means elsewhere than in shops as defined by section 74 (1). Section 58 enacts that the provisions shall extend to any place where any retail trade or business is carried on. I think the intention of that Act, as was the intention of the Act of 1936 under which the *Eldorado* case was decided, was to prohibit Sunday trading by retail save for the exceptions provided for in the Act, and I would have given the word "place" in the extension provisions of the Act of 1950 the widest possible

[2] [1938] 1 K.B. 715.

interpretation. I am fortified in taking that view by the decision of the High Court of Justiciary in Scotland in 1949 in *Nixon* v. *Capaldi*.[3] It is true that that was a decision under section 9 of the Shops Act, 1912, which had no relation to Sunday trading, but which brought the conditions of employment in shops into line with the conditions of employment in factories. But there is no distinction, in my view, so far as the relevant wording is concerned, and the High Court of Justiciary in that case came to a decision on the meaning of the word "place" which in my view cannot be reconciled with the meaning applied to it in the *Eldorado* case.[4] I refer to *Cowlairs Co-operative Society* v. *Glasgow Corporation*[5] to which Mr. Boreham in his admirable argument drew our attention, in order to say that I see nothing in that decision which conflicts with the decision in *Nixon* v. *Capaldi*.[6]

I should again like to emphasise, as the present Chief Justice has done in this court on more than one occasion, the desirability of allowing within limits an appeal beyond this court in a criminal cause or matter, since as the law stands at present no further appeal lies. I agree that this appeal should be dismissed.

DEVLIN J. I agree. Three attempts have now been made to bring mobile vans which act as shops within the purview of the Shops Acts which have been consolidated in the Act of 1950. In the first place it has been suggested that a mobile van which is fitted up as a shop is in the popular sense of the word a shop and therefore quite capable of being brought within the Act. The definition in the Act, it is argued, is not comprehensive; it says that a shop includes premises, and there is no reason therefore why mobile vans should not be treated as shops for the purposes of the Act. I confess a great deal of sympathy with that argument, but it has not been very fully explored and, I think, rightly so, because it came before the Scottish court in the *Cowlairs* case.[7] That very argument was put up, and it was there rejected; and it seems to me most desirable wherever possible for the sake of uniformity of decisions under these statutes that we should follow the decisions of the Scottish courts, and that excludes that argument. The second way of bringing it within the Act is to suggest that the van itself or the tricycle, or whatever it may be, is a place where retail trade or business is carried on. By section 58 the provisions of the Act of 1950 are extended to any place where any retail trade or business is carried on as if that place were a shop. That failed in the *Eldorado* case[8] and consequently it has not been suggested again here. The third way of doing it is to say that the place for the purposes of section 58 is not the van or tricycle, but the ground on which the van or tricycle stands, and that way of bringing the thing within the

[3] 1949 S.C.(J.) 155.
[4] [1938] 1 K.B. 715.
[5] 1957 S.C.(J.) 51.
[6] 1949 S.C.(J.) 155.
[7] 1957 S.C.(J.) 51.
[8] [1938] 1 K.B. 715.

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Act has received the support of *Nixon* v. *Capaldi*.[9] I agree with Mr. Boreham that one can distinguish the *Eldorado* case [10] on that ground because Lord Hewart C.J. in the *Eldorado* case said specifically that that argument as to the meaning of the word "place" had not been brought before the court and he was not dealing with it. But I agree also with Lord Goddard C.J. and Slade J. that such a distinction would be to introduce too nice reasoning, and it would also mean that a great deal of the argument and submissions that commended themselves to Lord Hewart C.J. and on which he based his judgment in the *Eldorado* case would be erroneous. Therefore, having to choose in that way between the *Eldorado* case and *Nixon* v. *Capaldi* [11] I choose the *Eldorado* case; and I have the less hesitation in doing so because I find difficulty in appreciating the basis of the decision in *Nixon* v. *Capaldi* and much prefer the view that the ground on which the van or tricycle stands is not a place within the meaning of section 58. I can state my reasons for that quite briefly. The Act is to extend not to any place where the sale happens to be effected but to a place where the retail trade or business is carried on. Here the place is alleged to be an area in Peterhouse Crescent, Woodbridge, situate outside No. 106. It might also have been a dozen or a score of similar places where other sales happened to be effected. Is that a place where any retail trade or business is carried on? Is each of them such a place? I think so to hold would be to strain the meaning of the Act in order to produce a result that is not in accordance with common sense. There are many sections of the Act which seem to me to make it clear that section 58 has in mind a place where business is carried on in the ordinary sense of the word and not where any trader happens to effect a sale in the course of his business, there being to my mind a clear distinction between the two. No better section could be introduced as illustrative of that than the very section under which this prosecution was brought, section 47, which says: "Every shop shall, save as otherwise provided by "this Part of this Act, be closed for the serving of customers on "Sunday." The requirement of closure makes it plain that the place is something which is fixed, a place where business is carried on, and not a place where a casual sale happens to be effected. I think the ordinary man could not make sense of a requirement of the law that he was required in the words of this information to close a place being a part of Peterhouse Crescent outside the dwelling-house No. 106. I think it is very undesirable that this court should strain to give meanings to a section of the Act which would produce a result incomprehensible to the traders who have to deal with it. The result is, I think, that it must now be taken as definitely decided in these courts that a mobile van is not a shop within the meaning of the Shops

[9] 1949 S.C.(J.) 155.
[10] [1938] 1 K.B. 715.
[11] 1949 S.C.(J.) 155.

Act, 1950, and if Parliament desires to make it so it must introduce new legislation for that purpose.

Appeal dismissed.

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Solicitors: *Berrymans for G. C. Lightfoot, Ipswich; Field, Roscoe & Co., for Gotelee & Goldsmith, Ipswich.*

J. D. P.

[COURT OF APPEAL.]

JENNINGS *v.* KINDER (INSPECTOR OF TAXES). HOCHSTRASSER (INSPECTOR OF TAXES) *v.* MAYES.

C. A.

1958 *June* 9, 10, 11; *July* 7.

Jenkins, Parker and Pearce L.JJ.

Revenue—Income tax—Employment—Collateral agreement—Scheme by employer to provide housing assistance to employees—Loss on sale of dwelling on transfer to new place of work to be made up by employer—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 156 (2), *Sch.* 9, *Rules applicable to Schedule E, r.* 1.

Imperial Chemical Industries Ltd. was a very large company owning numerous factories in different places, and employing a very large staff, many of whom were required by their service agreements to be prepared to serve the employers wherever required. In order to assist in the housing of married male employees of certain grades, and to facilitate their transfers, the employers designed a scheme whereby they assisted by interest-free loans to a certain extent towards the purchase of houses by such staff. The scheme further provided, inter alia, that if on transfer the employee wished to sell or let his house, he was to give an option to the employers to purchase it at a fair valuation; if the option was refused, he was free to sell it, but in either case the employers guaranteed him against any capital loss, provided that the house had been maintained in good repair. Employees who accepted the scheme were required to enter into formal agreements, the terms of which were in accordance with the provisions of the scheme.

Two employees, who had executed such agreements, were each transferred to different parts of the country, and sold their houses, with the employers' consent, at a loss which was recouped to them in each case pursuant to the agreements.

It was sought to make them chargeable to income tax under Schedule E [1] in respect of the sums so recouped:—

Held, (1) that the question of liability to tax depended on whether or not the payment made under the guarantee was made to the employee in that capacity and for no consideration other than services; (2) by Jenkins and Pearce L.JJ (Parker L.J. dissenting) that, although the agreement was entered into by the employee in his capacity as such, it was a genuine bargain advantageous to both parties, under which the employee gave good consideration for the benefits received, so that it should be regarded as collateral and made for a consideration other than the employee's services. Accordingly no tax was chargeable.

[1] Income Tax Act, 1952, s. 156 (2): "Tax under this Schedule shall "also be charged in respect of any "office, employment or pension the "profits or gains arising or accruing "from which would be chargeable to "tax under Schedule D but for the "proviso to paragraph 1 of that "Schedule."

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Dictum of Stirling L.J. in *Herbert* v. *McQuade* [1902] 2 K.B. 631, 650; 18 T.L.R. 728 applied.

Per Jenkins L.J.: The transaction may be described as a form of insurance. It cannot bestow any profit on the employee, but merely protects him against loss. To segregate the benefit (in cases in which it is material) from the burden, and to ignore the cost to the employee of obtaining it, in the shape of the purchase money he has laid out on the faith of the scheme and agreement, and lost through the depreciation in value of the house, ignoring also the other forms of consideration moving from the employee, and thus to arrive at the conclusion that the sum paid by the employers under the indemnity by way of recoupment for that loss is a profit of his employment, as being a sum received for no consideration other than services, appears to me to involve a considerable distortion of the facts.

Per Pearce L.J. If, looking fairly at the agreement, one can say that this is a fair agreement (albeit generous to the employee in certain events) under which the company gets appreciable benefits (other than the mere benefit of giving a financial advantage to this particular employee and thus making him a more contented worker), and that the employee gives a genuine and appreciable consideration, then that is enough to make it a collateral transaction. The question how onerous it is to him to give that consideration is a relevant matter but should not, I think, be by itself the deciding factor. . . . Perhaps a convenient test might be this: Is this a scheme that could commend itself on its merits to a director who thinks that the company's employees are already adequately paid, and does not intend to do anything for the mere purpose of giving them additional financial benefits?

Per Parker L.J. There is no substantial consideration apart from services. . . . Not only is the object of the agreement to improve the services which the employee is giving, but in my judgment the indemnity is given in consideration of those services just as if the service agreement had itself provided that the remuneration was to include the benefits under any housing agreement.

Per totam curiam. The principles applicable are well settled; the difficulty is to apply them to the facts of particular cases.

Decision of Upjohn J. [1958] 2 W.L.R. 982; [1958] 1 All E.R. 369 affirmed.

APPEALS from Upjohn J.

HOCHSTRASSER (INSPECTOR OF TAXES) *v.* MAYES.

This case, which was argued first in the court below, was an appeal by Eric John Lazare Hochstrasser (Inspector of Taxes) against a decision of the General Commissioners of Income Tax for Langbaurgh East, Yorkshire, disallowing an assessment to income tax made on Leonard Harry Mayes under Schedule E in the sums of £1,170 which included the sum of £350 paid or credited to him by his employers under their housing assistance scheme.

The following facts appear from the case stated. Since December, 1941, Leonard Harry Mayes had been an employee of Imperial Chemical Industries Ltd., and immediately before September, 1950, he had been employed by them at Welwyn, Herts. He was then transferred to their factory at Hillhouse,

Lancs, and on April 27, 1951, he entered into a service agreement with his employers. At or about this time the scheme operated by his employers to provide assistance with the purchase of housing for their married male staff came to his notice, and on June 1, 1951, he entered into an agreement based on that scheme with his employers. The agreement was a lengthy document which carried out in great detail the provisions of the scheme. In so far as is material, the housing scheme provided that the employers were prepared to offer their employees assistance in the purchase of a house provided that the price was within certain limits. It stated that the company were prepared to make an interest-free loan to an amount which varied in relation to gross Imperial Chemical Industries Ltd. emoluments, and set out the terms of the loan, which was to be secured by a mortgage of the house; where there was a first mortgage by a building society or a private lender, the interest-free loan was to be secured by a second mortgage. In cases where the employee financed the purchase, it would be a first mortgage. By paragraph 2 of the scheme: "It is not the present intention of the "company to require the interest-free loan to be repaid until the "expiration of fifteen years," or the earlier of the following events: transfer by the company to a new locality so that the employee ceased to reside in the house, or giving up possession of the whole or any part of the house, or retiring from the service on pension, or leaving the company's employment or death. The scheme continued "Subject to your maintaining the house in "good repair, the company will guarantee you against loss or "depreciation of the house on the following terms: 1 (*a*) The "value of the house on the happening of any of the following "events, namely: (i) If you are subsequently transferred by the "company and you wish to sell or let the house: (ii) If you "die whilst in the service of the company: (iii) If you retire "on pension. (*b*) In the event of your being transferred by the "company, and by reason of such transfer you wish to sell or "let the house, you will offer the house to the company who "will have the right to buy it at a valuation price. If the house "is purchased by the company and the valuation price is less than "the original cost price plus improvement costs, the difference is "made up by the company under guarantee. If the house is "not purchased by the company, the provisions of the two "following sub-clauses (*c*) and (*d*) will apply. (*c*) If the house "is sold within one year after such one of the three events "mentioned in (*a*) above as shall first happen and the sale is a "bona fide sale at the best price reasonably obtained and is not "for the purpose of a speculation, the company will pay you or "your executors or administrators, in the case of your death, "the amount (if any) by which the sale price is less than the "original cost price, together with improvement costs. (*d*) If the "house is not sold within one year, a valuation is made at the "end of that year and if the valuation price is less than the

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"original cost price, plus any improvement costs, the company "will pay the difference."

The scheme further provided that where the employee desired to sell his house for his own reasons, but not for one of the reasons set out in paragraph 2 above, that the company would consent to the sale if good and sufficient reasons were given, and if there were a loss, that the company would bear that loss.

In June, 1951, Mayes bought a house at No. 16, Ribble Road, Fleetwood, for the sum of £1,850. Of this amount £90 was provided by Mayes, £1,460 was borrowed on a first mortgage from the Abbey Building Society and £300 was borrowed on a second mortgage from his employers, who paid all legal costs including stamp duties, together with the expense of removal from Welwyn to Fleetwood. In October, 1954, Mayes was transferred to Wilton, Yorks, and, in accordance with the housing agreement, offered his house to the employers, who declined to accept it. With their consent, the house was sold for £1,500 and the loss of £350 was made good to Mayes by the employers. The commissioners found that the terms of Mayes' employment were completely independent of the housing agreement and that salaries paid by Imperial Chemical Industries Ltd. compared favourably with salaries paid by other employers not operating a housing scheme.

The contentions made before the commissioners on behalf of Mayes were that any benefit received by him under the housing scheme was to meet a loss of capital, and as such was not taxable, and further that if there had been any taxable benefit it should have been assessed for the year 1950–51. The Inland Revenue contended, however, that the sum of £350 represented a profit from Mayes' employment for which he was chargeable to income tax and that no deduction could be allowed in respect of it under rule 7 of Schedule 9 to the Income Tax Act, 1952. The commissioners decided that the £350 was a payment made against a capital loss and was not therefore taxable.

Jennings *v.* Kinder (Inspector of Taxes).

In this case Charles Maurice Jennings appealed from a decision of the General Commissioners of Income Tax for Stockton Ward, County Durham, against an additional assessment in the sum of £450 made on him under Schedule E to the Income Tax Act, 1952, for the year 1953–54.

The facts in this case were admitted to be as follows: Jennings joined Imperial Chemical Industries Ltd. in July, 1944, when he was living in London. In January, 1949, he was transferred to Wilton, Yorks, and in April, 1952, he was again transferred to Billingham, Durham, and on each occasion he acquired a house under his employers' housing assistance scheme. On the first transfer he sustained a loss of £80 which was made good to him in accordance with the scheme. On the second transfer he again sustained a loss and the sum of £450 was paid to

him. In both cases his costs and removal expenses were paid by the employers. When Jennings began his employment in 1944 he did not know of the housing scheme and was not thereby moved to join because of it. If there had been no such scheme he would still have been employed by Imperial Chemical Industries Ltd. and he considered that his remuneration was adequate for the work which he did. It was further admitted that an employee's salary was calculated independently of any benefits which he might derive from the housing scheme, and that the sum of £450 was not salary for services under Jennings' service agreement with his employers.

It was contended on Jennings' behalf that the sum of £450 received by him was to meet a capital loss sustained by him and was therefore not taxable, and further that any benefit accruing to him under the scheme was not a reward for his services. It was also contended that if any benefit under the housing scheme was a taxable emolument, the like amount was wholly and exclusively and necessarily expended by Jennings in the performance of the duties of his employment, and that, therefore, no taxable profit emerged.

On behalf of the Inland Revenue it was said that the sum of £450 represented a profit or emolument of the taxpayer from his employment and was in the nature of income, and was accordingly assessable to tax under Schedule E and Schedule 9, rules 1 and 4 of the Income Tax Act, 1952, and that an additional assessment in respect thereof was properly made on him for the year 1953–54, and, further, that if tax was chargeable, no reduction in respect of the £450 was allowable under rule 7 of Schedule 9, in that any expense incurred by Jennings in selling his house was not incurred wholly, exclusively and necessarily in performing the duties of his employment. The commissioners upheld this contention and were also of opinion that the loss on the sale of the house in 1953 was not money wholly, exclusively and necessarily expended in the performance of the duties of the office or employment held by Jennings within the meaning of rule 7 of Schedule 9 to the Income Tax Act, 1952, and accordingly they confirmed the additional assessment.

In both cases the commissioners found that the employers instituted the scheme to secure a contented and therefore efficient staff, it being well recognized that the transfer of a married man from one district to another without the assistance of such a scheme would involve him in worries and financial embarrassments.

The terms of the agreements entered into by employees under the scheme were summarized as follows by Jenkins L.J.:

The guarantee was to operate:

(i) In the event of the employee being transferred to a new place of employment in the service of I.C.I. and consequently desiring to sell or let the house. In that case the employee must

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offer to sell the house to I.C.I. If I.C.I. accepted, then the house was to be bought by I.C.I. at the current market value ascertained by valuation; and if such value was less than the employee's expenditure on the house I.C.I. became liable to pay the difference to the employee. If I.C.I. declined, then the employee was at liberty to sell to a third party and I.C.I. became liable to pay the employee the amount if any whereby the price realized fell short of his expenditure on the house (clause 2).

(ii) In the event of the sale of the house by the employee or his personal representatives within 12 months after (a) the refusal by I.C.I. of an offer made on transfer under (i) above or (b) the retirement of the employee or (c) the death of the employee (whichever first happened) I.C.I. became liable to pay to the employee or his personal representatives the amount if any whereby the price realised on such sale fell short of the employee's expenditure on the house (clause 3 (1)).

(iii) If the house was not sold before the expiration of the period of 12 months mentioned in (ii) above, then there was to be a valuation of the house and I.C.I. became liable to pay to the employee or his personal representatives the amount (if any) whereby the employee's expenditure on the house exceeded the amount of the valuation (clause 3 (2)).

(iv) If at any time before such one of the three events mentioned in (ii) above as should first happen the employee while still in the service of I.C.I. desired to sell the house he might do so, but in that case he was only to be entitled to the benefit of I.C.I.'s guarantee against capital loss if he obtained I.C.I.'s consent to the sale and offered to sell the house to I.C.I. If I.C.I. accepted the offer then the house was to be bought by I.C.I. on similar terms to those stated in (i) above (*i.e.*, with the benefit of the guarantee). If I.C.I. declined the offer then the employee might sell to whom he pleased and I.C.I.'s guarantee was to apply to any resulting capital loss (clause 4)).

The agreement was to continue in force for a period expiring 12 calendar months after the death of the employee, but subject to fulfilment of accrued rights it ceased automatically upon such one of the following events as should first happen, that is to say if the employee should: (A) Be transferred for service with I.C.I. elsewhere and offered to sell the house to I.C.I. (B) Retire from the service of I.C.I. on pension. (C) Cease to be employed by I.C.I. for any other reason. (D) Sell or let the property or any part thereof. (E) Cease to use the house as a permanent residence (clause 11).

It was a condition precedent to I.C.I. affording to the employee a guarantee against any capital loss he might suffer that the employee should at all times keep the house in good tenantable repair (clause 6).

In Mayes' case the Crown and in Jennings' case the taxpayer

appealed. The appeals were heard together by Upjohn J., who gave judgment for the taxpayer in both cases.

The Crown appealed.

John Pennycuick Q.C. and *Alan Orr* for the Crown.
F. N. Bucher Q.C. and *H. H. Monroe* for the taxpayers.

The following cases which were cited in argument are not referred to in the judgments: *Ede* v. *Wilson* [2]; *Blackiston* v. *Cooper* [3]; *Cameron* v. *Prendergast* [4]; *Ricketts* v. *Colquhoun* [5]; *Bolam* v. *Barlow* [6]; *Paterson Engineering Co. Ltd.* v. *Duff*.[7]

Cur. adv. vult.

July 7. The following judgments were read.

JENKINS L.J. I have felt considerable difficulty over these two cases, but with some hesitation I have come to the conclusion that the appeals should be dismissed.

I need not repeat the facts at length. The housing scheme established by I.C.I. was designed to assist married male members of the staff of I.C.I. to buy suitably located houses for occupation by themselves and their families in the event of their being transferred from one part of the country to another in the course of their employment by I.C.I. The assistance provided consisted, in effect, of a contribution by I.C.I. towards the cost of the house in the form of an interest free loan, and a guarantee by I.C.I. indemnifying the employee concerned against loss through depreciation in the value of the house. No question arises in regard to the interest free loan. As regards the guarantee, admission to the scheme was to be afforded by means of a standard form of housing agreement to be entered into between I.C.I. and the employee concerned, setting out in considerable detail the terms on which and circumstances in which the guarantee was to operate.

The respondent employees in these two appeals both bought houses on being transferred to new places on work and, pursuant to the scheme, both duly entered into housing agreements with I.C.I. Both were later again transferred and sold their houses in consequence. The house in each case realized less on such sale than the employee had paid for it, and under their guarantee I.C.I. paid or allowed in account to the employee the appropriate sum in respect of such loss.

The sole question in each of the two appeals is whether the sum so paid or allowed by I.C.I. to the respondent employee was

[2] [1945] 1 All E.R. 367; 26 T.C. 381.
[3] [1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347.
[4] [1940] A.C. 549; 56 T.L.R. 499; [1940] 2 All E.R. 35; 23 T.C. 122.
[5] [1926] A.C. 1; 42 T.L.R. 66; 10 T.C. 118.
[6] (1949) 31 T.C. 136.
[7] (1943) 24 T.C. 43.

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a profit of his employment and, accordingly, chargeable to income tax under Schedule E. The charge to tax under this Schedule is now contained in section 156 of the Act of 1952, and paragraph 2 of the Schedule as therein set out provides: "Tax under this "Schedule shall also be charged in respect of any office, employ- "ment or pension the profits or gains arising or accruing from "which would be chargeable to tax under Schedule D but for the "proviso to paragraph 1 of that Schedule." Paragraph 5 applies the provisions of the Ninth Schedule to the Act. Rule 1 of that Schedule is in these terms: "Tax under Schedule E shall be "annually charged on every person having or exercising an office "or employment of profit mentioned in Schedule E, or to whom "any annuity, pension or stipend chargeable under that Schedule "is payable, in respect of all salaries, fees, wages, perquisites "or profits whatsoever therefrom for the year of assessment, after "deducting the amount of duties or other sums payable or charge- "able on the same by virtue of any Act of Parliament, where the "same have been really and bona fide paid and borne by the party "to be charged."

The objects with which I.C.I. established the housing scheme are thus described in the case stated with respect to Mayes:

"3 (*g*). I.C.I. have to move a great number of their staff from "one part of the country to another. The company recognizes "that the transfer of a married man involves him in domestic "upheaval.

"Although a man might be willing to buy a house in the "new location, his chief worry was the loss he might make if he "had to sell the house. I.C.I. try to operate a staff policy "which results in a contented staff. Unless the staff are con- "tented they do not do their best work. I.C.I. therefore "introduced the housing scheme so that they should have "employees whose minds were eased to some extent of the worry "of possible financial embarrassment in the future arising out of "the removal occasioned by the company's action."

The case stated with respect to Jennings contains in paragraph 5 a description of I.C.I.'s objects which, though couched in different language, is substantially to the same effect.

The housing agreements entered into by I.C.I. with Mayes and Jennings respectively are attached to the two cases and I need not recite them in full. They are in the standard form used by I.C.I. for the purposes of their housing scheme, and their salient features for the purposes of the two appeals may be thus summarized: [His Lordship summarized the terms as set out above, and continued:] Such being the nature of the housing agreement, were the payments made by I.C.I. to Mayes and Jennings respectively pursuant to the guarantee upon their respectively being transferred and selling their houses for less than they had paid for them, after first duly offering them to I.C.I., profits of their employment with I.C.I.? We were referred to many of the

authorities in which payments received by holders of offices or employments in an infinite variety of circumstances have been held to be or not to be profits of the office or employment for tax purposes. I do not propose to go into them at length. The general principles to be applied are well settled. The difficulty is to apply them to the facts of particular cases.

I am content to accept Mr. Pennycuick's broad proposition that the profits of an office or employment include every sum in money or money's worth paid by an employer to an employee during his employment in his capacity as employee, and for no consideration moving from the employee other than the services which he renders. I would, however, qualify that broad proposition by saying that is not to be taken as extending to "testimonials" of the kind considered by the House of Lords in *Seymour* v. *Reed*,[1] and also that there may be benefits casually bestowed by an employer on an employee such as birthday, Christmas, or wedding presents, or given on compassionate grounds referable to relationships, friendship, social custom, or motives of charity which, though made for no consideration in the legal sense, should not be treated as referable to services or as made to the employee in that capacity. But no exception of that kind arises here.

I am also content to accept the converse proposition that a payment made by an employer to an employee for a consideration other than services is not a profit of the employment albeit made during the continuance of the employment.

The decisive question in each of these two cases, therefore, is, as I see it, simply whether the payment made by I.C.I. to the employee pursuant to the guarantee is a payment made to the employee in that capacity and for no consideration other than services, in which case it is taxable as a profit of his employment, or was such payment made for a consideration other than services, in which case it is not so taxable.

I think it may truly be said that the housing agreement in each case was entered into by I.C.I. with the employee in his capacity as employee, in the sense that it was by virtue of his being an employee of I.C.I. that he was given the opportunity of participating in the housing scheme, and for that purpose of entering into the housing agreement with I.C.I. But it does not necessarily follow that the employee, having entered into the housing agreement and, thereafter, receiving a payment from I.C.I. under the guarantee, must be taken to have received that sum in his capacity as employee, and for no consideration other than services. The employee was enabled to enter into the housing agreement by virtue of the fact that he was an employee of I.C.I. But any payment he might receive under the housing agreement would be received by him because, being an employee of I.C.I., he had entered into the housing agreement and had complied with all its terms and conditions.

[1] [1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 625.

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In order to participate in the housing scheme an employee of I.C.I., over and above answering that description, and being married, had to comply with a number of conditions. In order to bring himself within the ambit of the scheme he had, of course, as an essential prerequisite, to buy a house, and find the purchase money for it, either out of his own resources or by means of an ordinary mortgage supplemented by an interest-free loan granted by I.C.I. It is, of course, true that an employee need not buy a house or enter the scheme unless he chose. But any employee buying a house and entering the scheme must, I think, be taken to have done so on the faith of the scheme. Apart from the scheme and the guarantee which it promised, he would in all probability not have ventured to buy a house owing to the risk of capital loss in the event of his having to sell, especially in the case of his being transferred. Then he had to enter into the housing agreement and comply with the conditions on which his right to the indemnity was by that agreement made to depend. In the forefront of those conditions is the positive obligation laid upon him to offer the house for sale to I.C.I. in the event of his desiring to sell or let it by reason of transfer. This, as I understand it, is an obligation with which the employee is bound to comply in that event, and not merely a condition he must fulfil in order to claim the benefit of the guarantee. Moreover, it applies when the employee desires to let and not merely when he desires to sell. This, I think, is a restriction of substance. The employee might have perfectly good reasons for wishing to let rather than sell on being transferred. But the housing agreement precludes him from doing this without first offering the house for sale to I.C.I. Then it is to be observed that the agreement makes it a condition precedent to any claim under the guarantee that the employee should keep the house in good tenantable repair. It is, of course, true that on spending money on repairs the employee would be maintaining the value of his own property. Nevertheless, this stipulation does impose as a condition of benefit an obligation not incumbent upon a freeholder in the ordinary way. Then the provisions as to the termination of the housing agreement include, as bringing about such termination, the events of the employee letting the house or any part thereof, or ceasing to use the house as a permanent residence. It appears to me that the condition against letting (and particularly against letting " any part " of the premises) might operate substantially to the detriment of the employee, as also might the condition against ceasing to use the house as a permanent residence (whatever the precise meaning of that expression may be). Then, in the event of the employee desiring to sell otherwise than on transfer or retirement (in which event, as in the case of a sale by the personal representatives of a deceased employee, the house is not apparently required to be offered for sale to I.C.I.) no claim can be made under the indemnity unless I.C.I.

consents to the house being sold and the house is first offered for sale to I.C.I.

The rights of the first refusal given to I.C.I., particularly the positive obligation the employee is under to offer the house for sale to I.C.I. where an employee desires to sell or let on transfer, might well be advantageous to I.C.I., notwithstanding their obligation under the guarantee, in the event of there being a shortage of suitable accommodation for their employees. One may take it, too, that I.C.I. regard it as expedient from a business point of view that employees should be encouraged to buy houses on the terms of the housing scheme and agreement, thus helping to ease the problem of staff housing.

The matter is put by Mr. Pennycuick as one of pure bounty on the part of I.C.I. referable to no consideration moving from the employee other than services. I cannot share this view. The balance of burden and benefit under the housing agreement must be regarded as at the date when it is entered into with any given employee. When it is entered into no one can tell whether the house will rise or fall in value. If it rises in value, the employee gets no benefit apart from peace of mind. On the other hand, in order to be covered against a possibility of loss which has never materialized, the employee will, it may well be to his detriment, have done or abstained from doing the things which under the housing agreement he is required to do, or abstain from doing it as a condition of benefit. I.C.I., on its part at least, gets the advantage of the right of pre-emption in the event of the employee desiring to sell or let on transfer, which in the circumstance I postulate would entitle I.C.I. to buy simply at the current market value without any addition thereto for depreciation in value, since there would have been none. In the event of the house depreciating in value the employee does, no doubt, gain a substantial advantage, but not, as I think, by any means an advantage representing pure bounty on the part of I.C.I. referable to no consideration moving from the employee other than his services.

The transaction may be described as a form of insurance. It cannot bestow any profit on the employee, but merely protects him against loss. To segregate the benefit (in cases in which it is material) from the burden, and to ignore the cost to the employee of obtaining it, in the shape of the purchase money he has laid out on the faith of the housing scheme and agreement, and lost through the depreciation in value of the house, ignoring also the other forms of consideration moving from the employee as above described, and thus to arrive at the conclusion that the sum paid by I.C.I. under the indemnity by way of recoupment for that loss is a profit of his employment, as being a sum received for no consideration other than services, appears to me to involve a considerable distortion of the facts.

Mr. Pennycuick says (in effect) that this result must ensue because (a) the payment made by I.C.I. under the guarantee is

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a profit of the employee's employment taxable under Schedule E; (b) under rule 7 of the Rules applicable to Schedule E the employee cannot deduct any expenses not wholly, exclusively and necessarily incurred in the course of his employment; and (c) the expenditure incurred in the purchase of the house does not answer that description, inasmuch as the employee need not have purchased the house. Mr. Pennycuick says further, that if the employee could deduct the amount of his loss on the house (as in fact he could not) tax would be exigible on the corresponding amount paid to him by I.C.I. under the guarantee.

I find it difficult to rid myself of the inclination to think that if the house-purchase transaction is looked at as a whole no profit arises from it to the employee, even in a case in which the guarantee becomes operative. If that were right, then there would be an end of the matter. If it is wrong, and any sum paid under the guarantee is to be taken in isolation and looked on as profit, then the question remains whether it was paid by I.C.I. to the employee for no consideration other than services. If it is to be so looked on and was so paid, then I agree with Mr. Pennycuick that no deduction in respect of the employee's outlay on the house would be allowable.

The whole case in a simplified form can be put thus. Suppose an employer makes a bargain with his employee to the effect that if the employee buys a house in a given locality, keeps it in repair, refrains from letting it, uses it as a personal residence and undertakes to give the employer the first refusal of it in the event of his desiring to sell, the employer on his part will guarantee the receipt by the employee on any resale by him, whether to the employer or to some other purchaser, of a price equal to the current market value of the house, or the amount he paid for it, whichever is the greater. Suppose, further, that the employee does buy a house and duly complies with all the employer's requirements, and at some time thereafter, the stipulated offer to the employer having been made and refused, the employee sells the house to someone else at less than the price he paid, and the employer duly makes good the difference to the employee. In those circumstances, is the difference so made good to the employee, if a profit at all, a profit of his employment, as having been received by the employee in that capacity and for no consideration other than services?

Mr. Pennycuick pointed out that the discharge by an employer of a liability incurred by his employee to a third party may, to the extent of the liability thus discharged, constitute a profit of the employee's employment. In support of that proposition, which I fully accept, he cited *Hartland* v. *Diggines*,[2] where an employer paid his employee's income tax, and this was held to constitute a profit of his employment. He also cited on the same point *Nicoll* v. *Austin*,[3] where a managing director continued at

[2] [1926] A.C. 289; 42 T.L.R. 262; 10 T.C. 247.

[3] (1935) 19 T.C. 531.

the company's request to live in his own house, the company paying all outgoings, and these payments were held to be profits of his office.

For the proposition that a single payment to an employee may be a profit of the employment (which, again, I fully accept) he cited *Weston* v. *Hearn*,[4] where a lump sum paid to an employee on completing 25 years' service was held taxable.

For the proposition that a benefit contingently receivable by an employee as a profit of his office or employment is to be treated for tax purposes as income of the year in which it is received, Mr. Pennycuick cited *Edwards* v. *Roberts*.[5] I think that must be so where no money value can be put on the benefit until it is actually realized. So here, if the payment under the guarantee is rightly to be treated as a profit of the employee's employment, it would seem that it must be treated as accruing on the date on which it became payable, inasmuch as it could not be quantified until the contingency of capital loss materialized.

On the main issue of the case, Mr. Pennycuick referred us to the line of cases headed by *Hunter* v. *Dewhurst*,[6] in which payments made by companies to directors have been considered. These cases, no doubt, bear out the broad general proposition attributed to Mr. Pennycuick earlier in this judgment, but they equally bear out the converse proposition that a payment made by an employer to an employee for a consideration other than services is not a profit of the employee's employment. For example, in *Hunter* v. *Dewhurst* itself Lord Atkin said[7]: "Rule 1" (sc. of the Rules applicable to Schedule E) "appears "to me to indicate emoluments either received from the employer "or from some third party . . . as a reward for services rendered "in the course of the employment." Again, in *Beak* v. *Robson*, Lord Simon said[8]: "In the agreement before us the obligations "flowing from the contract of service and the remuneration to be "received by the respondent in respect of that service are entirely "separate from the restrictive covenant and the consideration "which is given for it. The sum of £7,000 is not paid for any-"thing done in performing the services in respect of which he is "chargeable under Schedule E."

We were also referred to the line of cases dealing with payments by third parties, headed by *Herbert* v. *McQuade*,[9] of which the latest examples are *Moorhouse* v. *Dooland*[10] and *Bridges* v. *Hewitt*.[11] This line of authority, besides affording ample recognition of the principle that to be taxable under Schedule E payments made to the holder of an office or employment must

[4] [1943] 2 All E.R. 421; 25 T.C. 425.
[5] (1935) 19 T.C. 618.
[6] (1932) 16 T.C. 605.
[7] Ibid. 645.
[8] [1943] A.C. 352, 355; 59 T.L.R. 90; [1943] 1 All E.R. 46; 25 T.C. 33.
[9] [1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489.
[10] [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93; 36 T.C. 1.
[11] [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281.

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be by way of remuneration for his services (see, in particular, Cave L.C. in *Seymour* v. *Reed*,[12] a passage too well known to bear repetition), clearly established the proposition that the question whether a given payment is a profit of his office or employment must be viewed from the standpoint of the recipient. This proposition has its origin in the well-known passage from the judgment of Sir Richard Henn Collins M.R. in *Herbert* v. *McQuade*[13]: "... the test is whether, from the standpoint of "the person who receives it, it accrues to him in virtue of his "office ..." The following passage from the judgment of Stirling L.J. in *Herbert* v. *McQuade* seems to me to be much in point: "A profit accrues by reason of an office when it comes to "the holder of the office as such and without the fulfilment of "any further or other condition on his part."

I do not see how the payments made by I.C.I. to the taxpayers in the present appeals can be held to have satisfied either of these tests. As to the latter, the employee here did have to fulfil further or other conditions. As to the former, I cannot conceive that either of the two respondents regarding the matter from their own point of view as recipients of the payments, could possibly have looked upon them as profits of their employment or, in other words, as remuneration accruing to them by reason of their employment by I.C.I. as distinct from payments which, in the events which happened, they received from I.C.I. under and by virtue of the housing agreement.

I derive assistance, too, from the following passages in *Beak* v. *Robson* and *Cowan* v. *Seymour*. In *Beak* v. *Robson* Lord Simon said[14]: "It is quite true that, if he had not entered into "the agreement to serve as a director and manager, he would not "have received £7,000, but that is not the same thing as saying "that the £7,000 is profit from his office of director so as to "attract tax under Schedule E." In *Cowan* v. *Seymour*, Younger L.J. said[15]: "... their office or offices as such ... may "have been the causa sine qua non but they were not the causa "causans." I think it may well be said here that while the employee's employment by I.C.I. was a causa sine qua non of his entering into the housing agreement and, consequently, in the events which happened, receiving a payment from I.C.I., the causa causans was the distinct contractual relationship subsisting between I.C.I. and the employee under the housing agreement, coupled, of course, with the event of the declining in value.

Mr. Pennycuick said (in effect) that a consideration other than services could only be shown if the consideration (other than services) moving from the employee for the benefit received demonstrably represented full value in money or money's worth for the benefit in question. I find no warrant in the authorities for this proposition. It would no doubt be right to disregard a fictitious or colourable bargain designed to disguise what was in

[12] [1927] A.C. 554, 559.
[13] [1902] 2 K.B. 631, 649, 650.
[14] [1943] A.C. 352, 355.
[15] [1920] 1 K.B. 500, 517.

fact remuneration as payable on some other account. But nothing of that sort enters into this case. The housing agreement constitutes a genuine bargain advantageous, no doubt, to the employee, but also not without its advantages to I.C.I., and I see no reason for disregarding it as the source of the payments sought to be taxed in these two appeals.

Mr. Pennycuick said further, that if partial consideration in money or money's worth was shown, there should be an apportionment, and he instances *Tilley* v. *Wales*.[16] But in that case it was possible to apportion the sum received so as to ascertain how much of it was attributable to the director's agreement to a reduction of salary (which was taxable), and how much to commutation of pension (which was not). In the present case obviously there could be no apportionment. It must be all or nothing.

For the reasons I have endeavoured to state, I do not think the sums received by the two respondents under their respective housing agreements were profits of their employment so as to be taxable under Schedule E, and, accordingly, in my view, both appeals (which it is now agreed must stand or fall together) should be dismissed.

PARKER L.J. This is not an easy case and it is with considerable diffidence that I have come to a different conclusion.

I do not think that any useful purpose would be served by going through the authorities. Most of them are conveniently collected in the judge's judgment in the present case, and in the recent decision of this court in *Bridges* v. *Hewitt*.[17] Though there appeared at one time to be an issue between the parties as to the true principle of law involved, I am satisfied that there is no real difference. The principle can, I think, be stated thus.

Where you find that an employee has during the course of his employment received from his employer a benefit in money or money's worth, that receipt is a profit of his employment and taxable as such unless (1) it amounts to a gift to him in his personal capacity, e.g., a benefit conferred out of affection or pity; or (2) it has been received for a consideration other than the giving of services. This can be put more shortly by saying that such a benefit, to be a profit of his employment, must have been received by him in his capacity of employee as a reward for services. In the two exceptions referred to above, though the benefits are received by him while he is an employee and might not have been received but for his being an employee, yet in his hands the benefit is not a reward for services.

The real difficulty is as usual in the application of that principle to the facts of the case. I will deal first with what I have referred to as the first exception. It was argued—albeit faintly—that the indemnity when received whether in money or in account was in

[16] [1943] A.C. 386; 59 T.L.R. 178; [1943] 1 All E.R. 280; 25 T.C. 136.

[17] [1957] 1 W.L.R. 674.

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truth a mere compassionate allowance. It is enough to say that in my judgment that is an impossible argument on the facts found in these cases. The housing scheme formed part of the I.C.I.'s staff policy and the housing agreement was one open to any of a class of employees who wished to avail themselves of it.

Whether, however, this can be said to be within the second exception is more difficult, and depends on a proper construction of the housing agreement. On behalf of the Crown it is contended that looked at broadly this agreement is wholly for the benefit of the employee, and that the real or substantial consideration is services. For the respondent, on the other hand, it is said that on a proper analysis the housing agreement itself sets out a substantial consideration and that it would be wrong to look outside the contractual terms in that agreement, cf. *Inland Revenue Commissioners* v. *Duke of Westminster*.[18] The housing agreement accordingly, it is said, is purely collateral to the service agreement.

Now I take it to be the law that it is not enough to make an agreement collateral in this sense that there is sufficient consideration to support it. Otherwise an agreement to make a purely voluntary payment for services, e.g., in recognition of 25 years' service, would, if under seal, come within the exception. Nor do I think that it is enough to make the agreement collateral that some term is inserted which may be said to be of some advantage to the employer or cause some detriment to the employee. Thus agreements with employees living 20 miles from their place of work, that employers would repay half the price of their season tickets, could not be said to be collateral merely because the employees would have to buy season tickets as a condition of getting repayment. The question, I think, in every case is one of degree depending upon whether the term can properly, in the surrounding circumstances when the agreement was made, be said to be merely a term of the receipt of additional benefit for the employee's services or can properly be said to amount in itself to the substantial consideration for the benefit, in which case the consideration is other than for services. In approaching the matter in this way I am not conscious of taking a line in conflict with the *Duke of Westminster* case.[19] I am merely construing the agreement in question in the light of the surrounding circumstances.

Now while the housing scheme is not altogether easy to construe I think that the following can be clearly deduced from it. (1) It is no part of the consideration that the employee agrees to be transferred. He has by his service agreement bound himself to go where he is sent and it is for him to get such living accommodation as he can at his new place of work. (2) If he desires to sell the house he will be entitled to any profit that is realized and he will be indemnified against any loss. (3) In certain events

[18] [1936] A.C. 1; 51 T.L.R. 467; 19 T.C. 490.
[19] Ibid.

he has to give his employers a first refusal to buy the house but if they do so he is to get the current market value. In assessing this any offers from prospective purchasers would no doubt have to be taken into consideration. Accordingly the employee can in no event suffer a pecuniary loss and he gives up nothing of pecuniary value. He is merely in certain cases restricted in his choice of purchasers. (4) Apart from having to give a first refusal in certain events the only possible detriment he could be said to suffer was that he had to keep the property in good tenantable repair, and that on transfer he is not allowed to let it. (5) While there is no express finding to this effect it is, I think, fair to assume that from time to time, though not in these cases, the first refusal will turn out to be of benefit to the employers in that it may enable them to offer the house to another employee. On the other hand it is clear, and there is an express finding to this effect, that the real object of the agreement is to make the employee contented and free from financial worry, an object which of course benefits both employee and employer. Bearing these considerations in mind I find it quite impossible to arrive at any conclusion other than that there is no substantial consideration apart from services. It would be quite unrealistic to say that the consideration for the indemnity is the giving in certain events of a first refusal or the obligation to keep in repair. Not only is the object of the agreement to improve the services which the employee is giving, but in my judgment the indemnity is given in consideration of those services just as if the service agreement had itself provided that the remuneration was to include the benefits under any housing agreement. To look at the matter from another angle, if such an agreement had been entered into by I.C.I. with a stranger, it could only be regarded as an instrument of bounty.

Great reliance, however, was placed by the respondents on the express finding that the salaries payable under the service agreement compared favourably with those paid by other employers not operating a housing scheme. This, it was said, if not conclusive, was at any rate prima facie evidence that the consideration under the housing agreement was for something other than services. For my part I find it impossible to attach any weight to this finding or argument. The salary which an employer is able to pay and pays depends on so many factors. One employer may find himself in a position to pay and will pay more than another and the fact that a good employer is already paying what is found to be a full and adequate salary goes in my judgment nowhere towards showing that some other benefit he is prepared to give is not in consideration of services.

Finally, it was contended on behalf of the respondents that even if the sums were received as a reward for services they were not the profits of employment. The agreement it was said only protects the employee against loss—it does not and cannot produce profit—and accordingly the sums received have none of the

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attributes of income. I confess that I cannot understand this argument. If sums received pursuant to an undertaking to pay obligations incurred to third parties are taxable, cf. *Hartland* v. *Diggines* [20] and *Nicoll* v. *Austin*,[21] I can see no reason why the present sums received pursuant to an agreement by way of indemnity are not equally taxable.

Accordingly I would allow these appeals.

Pearce L.J. In these cases the difficulties come, not from any difference in opinion as to what are the principles applicable to them, but from a difference as to how these principles should be applied to the facts. The cases turn on the view that one takes of the housing agreement.

The benefit under consideration is taxable as a profit of the employment, only if it has been received by the employee in his capacity of an employee as a reward for services and not for some consideration other than the giving of services. Stirling L.J. said in the well-known passage in *Herbert* v. *McQuade* [22]: "A "profit accrues by reason of an office when it comes to the holder of the office as such, in that capacity and without the fulfilment of any further or other condition on his part."

I fully accept that the "other condition on his part," the consideration moving from the employee, must be more than a technical consideration. It must not be a mere cloak to conceal any additional benefit given to the employee as such. It must in my view be such as to entitle both the consideration and the benefit obtained thereby to rank as a collateral transaction. The alleged collateral transaction need not be weighed in exact scales in order to see who benefits most by it. Such a task would be hard when on the one side you get a human who may be preoccupied with the price of a house and security against the risk of losing a comparatively small sum and on the other side a limited company with millions at its disposal concerned to see that the human frictions do not clog the machinery of its vast enterprises.

If, looking fairly at the agreement, one can say that this is a fair agreement (albeit generous to the employee in certain events) under which the company gets appreciable benefits (other than the mere benefit of giving a financial advantage to this particular employee and thereby making him a more contented worker), and that the employee gives a genuine and appreciable consideration, then there is enough to make it a collateral transaction. The question how onerous it is to him to give that consideration is a relevant matter but should not, I think, be by itself the deciding factor. When a man gives a consideration that costs him little but is important to a rich recipient he may fairly receive for it a price that is handsome in some contingencies. Perhaps a convenient test might be this: Is this a scheme that

[20] [1926] A.C. 289.
[21] 19 T.C. 531.
[22] [1902] 2 K.B. 631, 650.

could commend itself on its merits to a director who thinks that the company's employees are already adequately paid and does not intend to do anything for the mere purpose of giving them additional financial benefits?

The Crown contends that under the housing agreement the employee gets the reimbursement of loss on his home for no real consideration other than his services as an employee. If this is the true view, the sum in question is taxable.

One cannot shut one's eyes to the fact that every large company owning factories in different places and having to transfer staff from one to another for purposes of promotion, organization or otherwise, is bound to have a serious concern for the housing of employees so transferred—a concern which could at times become acute. Is this housing agreement seriously intended to help with that housing problem as it affects the company? Or is it merely intended to help the individual employee financially? Or is it a genuine attempt to fulfil both these intentions on a fair and mutual basis?

Under the scheme the employee is reimbursed in respect of loss but he does not make a profit in the normal sense. The first matter dealt with in the agreement is the moment when an employee is transferred. Under clause 2 if an employee who has bought a house on the terms of the agreement is transferred and wishes to sell or let (one of which in the ordinary case he will do) the company shall have a 30-day option on the house to buy it at a valuation. That clause is definite in its terms and there is no relaxation of it as there is in respect of a clause dealing with other situations. Is it unfair to draw the inference from the agreement that this option is of importance to the company? That inference accords with what one might expect as a matter of common sense. At the moment of transfer the company is concerned with the housing of a successor to the man transferred. Secure in the possession of an option, it can appoint a successor having (and imparting to him) the knowledge that a house is available at a valuation which the company can either buy (if need be) or guide into the successor's possession under its option. Moreover the option prevents the outgoing employee from being tempted to ask a fancy price from his successor. As other clauses provide for reimbursement of the owner for any loss, the agreement obviates the natural resentment that the owner would feel if compelled to sell to a rich company at what turns out to be a loss.

The employee is thus prevented from selling or letting his house on transfer before the company has had a 30-day option to buy it. It is true that if he wishes to keep on his house without selling or letting he may do so, e.g., if he leaves his family behind him. But this seems a reasonable concession, and I see no reason to suppose that in practice it would frequently arise or be used for any deliberate evasion of giving the option.

Clause 3 deals with the situation if the option is refused or

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the employee retires on pension or dies. Presumably it is because of not unreasonable social considerations that there is no provision by which the company can turn out a widow or pensioner. Many men would not enter schemes under which their widows could be evicted on their deaths or they themselves could be evicted on retirement. If any of the three events happen and within 12 months the house is sold at a loss, the company makes good the loss. If it is not sold within 12 months and a valuation shows it to be worth less than it cost the employee (plus improvements) the difference is paid by the company to the employee or his representatives.

Clause 4 deals with the situation where an employee before a transfer wishes to sell. If he wishes for reimbursement of loss he must obtain the company's consent and give the company a 30-day option to buy it at valuation. Clause 7 makes it clear that in respect of clause 4 (i.e., the time before transfer) the owner is always free to sell at a profit. The fact that clause 7 gives him no such freedom under clause 2 in respect of the moment of transfer would seem deliberate. The period when a man is still working where his house is, and he has not been transferred, could hardly create any housing problem. If a man sells his home in a place where he is still employed, he presumably does so because he knows that he can rehouse himself. At all events, he cannot thereafter blame the company if he is then homeless. In such a situation the company is only required to reimburse any loss if it has given its consent and gets an option on the house. It must be remembered that by reason of the fact of the agreement the company is probably in touch with the situation regarding the particular house, and is quite entitled to make any offers for it. Under clause 6 the employee has to keep the house in good and tenantable repair as a condition precedent to any reimbursement of loss.

In my view, the company gets a definite benefit from the scheme in its general problem of housing staff, as well as in its particular solicitude for the welfare of the individual employee, since it entitles it as a rule to a house for his successor. The employee does various things which are a real consideration. He has to find a house within reach of the factory, and embark on the venture of buying it, probably entering a first mortgage and probably producing some money of his own. He must keep the house in good condition. Before he can get any reimbursement he must suffer loss on resale. In many cases this will never arise; but in any event he has to give the company an option to buy it at a valuation on transfer, and thereby loses his opportunity of asking possibly an enhanced or fancy purchase price or rent from his successor, who might (if unsure of any housing on transfer) be prepared to pay it.

Any assumptions that I have made are, I think, natural inferences that should be drawn from the agreement, and are confirmed by the important surrounding circumstance that it is

an agreement with a member of the staff made by a large company which has to transfer its employees to various parts of the country. Paragraph 3 (g) of the case stated with regard to Mayes is not, I think, inconsistent with these inferences. That reads: "I.C.I. have to move a great number of their staff from one part "of the country to another. The company recognizes that the "transfer of a married man involves him in domestic upheaval "Although a man might be willing to buy a house in the new "location, his chief worry was the loss he might make if he had "to sell the house. I.C.I. try to operate a staff policy which "results in a contented staff. Unless the staff are contented they "do not do their best work. I.C.I., therefore, introduced the "housing scheme so that they should have employees whose "minds were eased to some extent of the worry of possible "financial embarrassment in the future arising out of the removal "occasioned by the company's action." The words "might be "willing to buy a house" seem to indicate that the company, as one would suppose, wishes to promote the owning of homes by its employees (no doubt for the company's ultimate benefit), and to remove the formidable deterrents that buying and owning a possibly transient home present to the man without capital resources.

It is true that overall the employee gets an advantage in many cases, but I think that this is a careful scheme with some gains and concessions on both sides. It is designed on terms very generous to the employee in certain events but not, in my view, to an extent that robs it of real mutuality.

The employment was a causa sine qua non of the benefit, but it was not the causa causans. Here there was no one causa causans. The benefit was produced by the joint effect of the employment, the finding and purchase of the house, the making of the housing agreement, the transfer of the employee and the loss of value in the house whereby the benefit became payable under the terms of that agreement.

I agree with the view expressed by the judge when he says [23]: "It was in no true sense a reward for his services. It was an "advantage to him but not, in my judgment, a profit. It was "something which was wholly collateral and really had nothing to "do with the office or the services which he was bound to render "to his employers."

I would dismiss these appeals.

Appeals dismissed.
Leave to appeal.

Solicitors: *Solicitor of Inland Revenue; J. W. Ridsdale.*

F. R. D.

[23] [1958] 2 W.L.R. 982, 992.

[QUEEN'S BENCH DIVISION.]

1958
June 26.

Barry J.

KELLEHER *v.* T. WALL & SONS LTD.

[1950 K. No. 1042.]

Evidence—Evidence Act, 1938—"*Person interested*"—*Action for personal injuries—Claim by employee against employer—Documentary statement made by another employee now deceased — Whether a "person interested"—Evidence Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1 (1) *and* (3).

A documentary statement which complies in all other respects with the requirements of section 1 of the Evidence Act, 1938,[1] is not necessarily inadmissible in evidence as a statement made by "a person interested" because the maker of the statement is in the employment of a party to the action. In order to decide the question of admissibility, the facts must first be ascertained as to the maker of the statement, the character and subject-matter of the proceeding and the relationship of the maker of the statement thereto.

In an action for damages for an injury sustained in the course of his employment brought by a chargehand in the production shop of a factory against his employers, the employers sought to tender in evidence a statement made soon after the accident by the then supervisor of the production shop, who had since died:—

Held, that the maker of the statement was so closely associated with the management of the production department, the efficiency of which the plaintiff was calling into question, that he must be treated as "a person interested" within the meaning of section 1 (3) of the Act, and accordingly the statement must be excluded.

In the Estate of Hill [1948] P. 341; [1948] 2 All E.R. 489 applied.

Observations of Asquith L.J. in *Barkway* v. *South Wales Transport Co. Ltd.* [1949] 1 K.B. 54, 60; 64 T.L.R. 462; [1948] 2 All E.R. 460 considered.

ACTION.

The plaintiff, Cornelius Kelleher, was employed by the defendants, T. Wall & Sons Ltd., as a chargehand in the production department at one of the defendants' factories. On April 30, 1956, he was required with two other men to move a heavy fruit lifting machine from one part of the factory to another. When lifting the machine onto a trolley for the purpose of transporting it he sustained an injury to his hand. He brought an action for damages against his employers alleging that his injury was caused by their negligence or breach of duty. The defendants denied liability.

[1] Evidence Act, 1938, s. 1 (1): "In "any civil proceedings where direct "oral evidence of a fact would be "admissible, any statement made by "a person in a document and tending "to establish that fact shall, on pro- "duction of the original document, be "admissible as evidence of that fact" if certain conditions are satisfied.

Subs. (3): "Nothing in this section "shall render admissible as evidence "any statement made by a person "interested at a time when proceed- "ings were pending or anticipated "involving a dispute as to any fact "which the statement might tend to "establish."

At the hearing of the action the defendants sought to tender as evidence, under section 1 of the Evidence Act, 1938, a statement made by one Atkins, who had been a supervisor in the production department of the factory at the time when the accident took place but who had since died. The statement was one which had been taken from the deceased by a representative of the defendants' insurers some three months after the accident occurred. Objection was taken by counsel for the plaintiff on the ground that the statement had been made by "a person "interested" and was therefore inadmissible.

Stephen Chapman Q.C. and *Alan de Piro* for the plaintiff.
W. L. Mars-Jones Q.C. and *David Stinson* for the defendants.

The following cases were cited in argument: *Plomien Fuel Economiser Co. Ltd.* v. *National Marketing Co.*[2]; *Bain* v. *Moss Hutchinson Line Ltd.*[3]; *Barkway* v. *South Wales Transport Co. Ltd.*[4]; *Evon and Evon* v. *Noble*[5]; *Cartwright* v. *W. Richardson & Co. Ltd.*[6]; *In the Estate of Hill.*[7]

BARRY J. Some three months after the accident with which the court is at present concerned a representative of the defendants' insurers very properly took a statement from a Mr. Atkins, who has most unfortunately since died. Mr. Mars-Jones, again with complete propriety, has sought to tender that statement in evidence under the provisions of the Evidence Act, 1938. It is conceded by Mr. Mars-Jones, as I understand his argument, that at the time when the statement was made, proceedings were at least contemplated; and it is conceded on the other hand by Mr. Chapman, that apart from the provisions of section 1 (3) of the Act, all the other requirements provided for in section 1 have been complied with. Therefore, it rests with me to consider, and to consider only, whether, on the authorities, it can properly be said that at the time when this statement was made Atkins was "a person interested." I think it is clear, as was said by Morton J. in *Plomien Fuel Economiser Co. Ltd.* v. *National Marketing Co.*,[1] that "a person interested" means a person who cannot in a true sense be regarded as an independent person.

A number of authorities have been cited to me. I do not propose to occupy time by considering them in detail. I am satisfied that some qualification must be placed upon the very broad proposition stated by Asquith L.J. in *Barkway* v. *South Wales Transport Co. Ltd.*[2] In that case, speaking of the maker

[2] [1941] Ch. 248; [1941] 1 All E.R. 311.
[3] [1949] 1 K.B. 51; 64 T.L.R. 473; [1948] 2 All E.R. 294.
[4] [1949] 1 K.B. 54; 64 T.L.R. 462; [1948] 2 All E.R. 460.
[5] [1949] 1 K.B. 222; [1948] 2 All E.R. 987.
[6] [1955] 1 W.L.R. 341; [1955] 1 All E.R. 742.
[7] [1948] P. 341; [1948] 2 All E.R. 489.
[1] [1941] Ch. 248, 251; [1941] 1 All E.R. 311.
[2] [1949] 1 K.B. 54; 64 T.L.R. 462; [1948] 2 All E.R. 460.

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of the statement, the Lord Justice used these words: "His "reputation as a tyre-tester was involved, and apart from that "he was interested as an employee in his employers winning the "case."[3] The Lord Justice cited as an authority for the latter part of that proposition *Plomien Fuel Economiser Co. Ltd.* v. *National Marketing Co.*,[4] to which I have already referred. Having regard to that decision, I do not think that Asquith L.J.'s words[5] can properly be read as laying down any general proposition that because the maker of the statement is in the employment of one or other of the parties to an action, that fact in itself must necessarily render any statement which he made inadmissible on the ground that he must necessarily be "a person "interested." With respect, I agree with what was said by Wallington J. in *In the Estate of Hill*.[6] Wallington J. used these words[7]: "It follows that in every case the facts must be "ascertained both as to the person whose statement it is sought "to put in evidence and as to the character and subject-matter "of the 'proceeding' and the relation of the person to the "subject-matter of the proceeding, in order to decide the question "of admissibility."

I have not a great deal of evidence before me as to the exact position of Atkins in the defendant company. I do, however, know this: he was a supervisor on the production side of the defendants' business. He came immediately below the manager of the production shop in the defendants' hierarchy, and was clearly the superior of the plaintiff, who was a chargehand, also on the production side. Further than that, the plaintiff's evidence is (and it is unchallenged) that at the time when he received instructions from the manager of the shop to move the machine which ultimately caused his injuries Atkins was in fact present.

Without going into any details here, it is quite clear that from the outset the plaintiff's claim called into question the efficient administration of the production side of the defendants' business, particularly in relation to No. 1 plant. The manager of the production shop was, of course, primarily responsible for the system of work adopted and for the general run of the production in it. Atkins, as the supervisor immediately below in the hierarchy, was also to a lesser extent responsible. In an action in which (to use the broadest possible term) the method of conducting the production side in No. 1 plant is called into question, I feel bound to hold that Atkins cannot be regarded in a true sense as an independent person. It is not necessary for me to find that his conduct must necessarily be called into question or impugned, but one can imagine circumstances in which it certainly could have been. If, for example, Atkins had known or had reported to him that this machine which the plaintiff had

[3] [1949] 1 K.B. 54, 60.
[4] [1941] Ch. 248.
[5] [1949] 1 K.B. 54, 60.
[6] [1948] P. 341, 344; [1948] 2 All E.R. 489.
[7] [1948] P. 341, 344.

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been told to move was in fact immobile owing to a rusting-up of its wheels and had remained silent when the manager of the production shop gave the order for its removal, without informing the manager of that fact, then, of course, in those circumstances his conduct would in the very real sense be called into question. However, quite apart from any definite criticisms which might have been made against him, it seems to me that any criticism of the conduct of this department would necessarily reflect not only upon the manager of the department but also upon the supervisor. In those circumstances, I think that Atkins was so closely associated with the management of the department which is clearly being called into question by the plaintiff that it would be wrong to treat him as anything other than "a person "interested" within the meaning of section 1 (3) of the Act.

In those circumstances, I do not think it would be right for me to receive this statement in evidence.

Statement excluded.

Solicitors: *Edward Mackie & Co.; Gascoin & Co.*

E. M. W.

[HOUSE OF LORDS.]

LONDON TRANSPORT EXECUTIVE . . APPELLANTS;

AND

BETTS (VALUATION OFFICER) . . . RESPONDENT.

H. L. (E.)*

1958
April 16, 17, 24; *June* 25.

Rates and Rating—Industrial hereditament—Road vehicle housing or maintenance—Public transport depot—Hereditament used for overhaul and repair of omnibuses—Whether used for "maintenance" of road vehicles—Whether a "place within . . . close, curtilage or "precincts of factory" but "deemed not to form part of the "factory" — "Maintenance" — "Overhaul" — "Reconstruc-"tion"—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3.

Judicial Precedent—House of Lords decision—How far binding—Point not adequately considered—Interpretation of statute—Conflict of particular precedent with fundamental principle.

A hereditament owned and occupied by the appellants was used as a depot for the periodic overhaul of omnibuses and for repair in the case of major accidents suffered by them. With insignificant exceptions the whole of the hereditament was used for dismantling and reconditioning used parts as distinct from manufacturing new ones. The process of overhaul involved detaching the body of the vehicle from its chassis, which was sent for overhaul elsewhere, and about 25 per cent. of the identifiable parts underwent some treatment or were replaced. After the process was completed the body

* *Present*: LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

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would not usually be reunited to the original chassis. The hereditament was included in Part I of the valuation list but the appellants contended that it ought to be treated as an industrial hereditament and transferred to Part II of the list, not being excluded from the definition of "industrial hereditament" in section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, by subsection (2)[1]:—

Held (Lord Denning dissenting), that the hereditament was not an industrial hereditament within the definition in section 3 of the Act. "Maintenance" within the meaning of section 3 (2) (*b*) included repairing, overhauling and reconditioning of vehicles so long as the work did not amount to reconstruction—the remaking of a new article—and no manufacture of new parts was carried out on a scale to which the de minimis rule could not be applied. The line between "maintenance" and "reconstruction" was one of fact and degree. "Maintenance" and "overhaul" were not mutually exclusive. The work carried out at the depot was "maintenance" within the meaning of section 3 (2) (*b*) of the Act, as amended. Further, the depot was excluded from the benefit of section 3 by subsection (2), although the whole of the hereditament, and not merely a definable part situated within the precincts of what would have been otherwise a factory within the definition, was used for the maintenance of road vehicles.

Potteries Electric Traction Co. Ltd. v. *Bailey* [1931] A.C. 151; 47 T.L.R. 154; *Scottish Motor Traction Co. Ltd.* v. *Edinburgh Assessor*, 1931 S.C. 416 and *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee* (1933) 18 R. & I.T. 77 applied.

Per Lord Reid. It has long been established practice that any decision of this House in a previous case on a question of law, such as the interpretation of a statute, shall be regarded as binding, and shall be followed, whether or not the question was adequately argued or considered, and however much your Lordships may disagree with the decision. I would not myself be against a modification of this strict practice, but so long as it exists I do not think that I am entitled to depart from it.

Per Lord Denning. It seems to me that when a particular precedent—even of your Lordships' House—comes into conflict with a fundamental principle, also of your Lordships' House, then the fundamental principle must prevail. This must at least be true when on the one hand the particular precedent leads to absurdity or injustice and on the other hand the fundamental principle leads to consistency and fairness. . . . Here every principle of construction requires this House to limit the word "maintenance" to

[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a heredita- "ment . . . occupied and used . . . "subject as hereinafter provided as a "factory or workshop: Provided that "the expression industrial heredita- "ment does not include a heredita- "ment occupied and used as a factory "or workshop if it is primarily occu- "pied and used for the following "purposes or for any combination of "such purposes, that is to say . . .— "(*f*) any other purposes, whether or "not similar to any of the foregoing, "which are not those of a factory or "workshop."

Subs. (2), as amended by s. 69 of the Local Government Act, 1929, which added subparagraph (*a*): "For "the purposes of this Act . . . (*b*) "any place used by the occupier for "the housing or maintenance of his "road vehicles . . . shall, notwith- "standing that it is situate within "the close, curtilage or precincts "forming a factory or workshop and "used in connexion therewith, be "deemed not to form part of the "factory, but save as aforesaid, the "expression 'factory' or 'workshop' "have the same meaning as in the "Factory and Workshop Acts, 1901 "to 1920."

ordinary maintenance and not to extend it to the vast repairs and reconditioning and reassembling done in this depot.

Decision of the Court of Appeal [1957] 1 W.L.R. 988; [1957] 3 All E.R. 126 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Morris and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal dated July 11, 1957, whereby an appeal by the appellants, the London Transport Executive, on a case stated by the Lands Tribunal (Erskine Simes Q.C.), pursuant to section 3 (4) and (11) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58A, was dismissed and the decision of the Lands Tribunal was affirmed. By its decision the Lands Tribunal had dismissed an appeal by the appellants from a decision of the Central Middlesex Local Valuation Court. The question to be determined was whether the hereditament, the subject of the appeal, was on March 29, 1954, and/or on January 3, 1955, being the dates on which the respondent, Henry Fennell Betts (valuation officer) and the appellants respectively made the proposals to alter the valuation list which initiated these proceedings, an industrial hereditament within the meaning of section 3 of the Rating and Valuation (Apportionment) Act, 1928.

The facts are fully stated in the opinion of Lord Morton of Henryton.

Sir Andrew Clark Q.C., *Michael Rowe Q.C.* and *David Widdicombe* for the appellants.

Maurice Lyell Q.C. and *Patrick Browne* for the respondent.

The following authorities, besides those cited in their Lordships' opinions, were referred to in argument: *Northern Motors* v. *York Rating Authority* [2]; *British Launderers Research Association* v. *Hendon Rating Authority* [3]; *B.P. Refinery (Kent) Ltd.* v. *Walker* [4]; *Fuller's Ltd.* v. *Squire* [5]; *Toogood & Sons Ltd.* v. *Green* [6] and *Turpin* v. *Middlesbrough Assessment Committee.* [7]

The following cases referred to by Lord Denning were not cited in argument: *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners* [8]; *Street* v. *British Electricity Authority* [9]; *London Co-operative Society Ltd.* v. *Southern Essex Assessment Committee* [10]; *Thomas* v. *British Thomson-Houston Co. Ltd.* [11]; *Thorogood* v. *Van den Berghs & Jurgens Ltd.* [12]; *Gilbert* v. *Hickinbottom & Sons Ltd.* [13]; *Wood* v. *London County Council* [14];

[2] (1934) 20 R. & I.T. 6.
[3] [1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21.
[4] [1957] 2 Q.B. 305; [1957] 2 W.L.R. 907; [1957] 1 All E.R. 700.
[5] [1901] 2 Q.B. 209.
[6] [1932] A.C. 663; 48 T.L.R. 463.
[7] [1931] A.C. 446, 470; 47 T.L.R. 308.
[8] [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406.
[9] [1952] 2 Q.B. 399; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.
[10] [1942] 1 K.B. 53; [1942] 3 All E.R. 252.
[11] [1953] 1 W.L.R. 67; [1953] 1 All E.R. 29.
[12] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.
[13] [1956] 2 Q.B. 40; [1956] 2 W.L.R. 952; [1956] 2 All E.R. 101.
[14] [1941] 2 K.B. 232; 57 T.L.R. 499; [1941] 2 All E.R. 230.

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Magor and St. Mellons Rural District Council v. *Newport Corporation* [15] and *Goodrich* v. *Paisner*.[16]

Their Lordships took time for consideration.

June 25. LORD MORTON OF HENRYTON. My Lords, the question arising on this appeal is whether a hereditament occupied by the appellants and known as "the Aldenham depot" is an "industrial hereditament" as defined by the Rating and Valuation (Apportionment) Act, 1928, which I shall call "the 1928 "Act," and is accordingly entitled to the benefit of the "derating" provided by section 68 of the Local Government Act, 1929. The Central Middlesex Local Valuation Court, the Lands Tribunal (Mr. Erskine Simes, Q.C.), and the Court of Appeal have all answered this question in the negative.

The definition of an industrial hereditament is to be found in section 3 of the 1928 Act, the relevant provisions whereof (as amended by section 69 of the Local Government Act, 1929) are as follows: "(1) In this Act the expression 'industrial hereditament' means a hereditament (not being a freight-transport "hereditament) occupied and used . . . subject as hereinafter "provided, as a factory or workshop: Provided that the expression "industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied "and used for the following purposes or for any combination of "such purposes, that is to say—(*a*) the purposes of a dwelling-"house; (*b*) the purposes of a retail shop; (*c*) the purposes of "distributive wholesale business; (*d*) purposes of storage; (*e*) the "purposes of a public supply undertaking; (*f*) any other purposes, "whether or not similar to any of the foregoing, which are not "those of a factory or workshop. (2) For the purposes of this "Act— . . . (*b*) any place used by the occupier for the housing or "maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts "forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop, "but save as aforesaid, the expressions 'factory' and 'workshop' "have respectively the same meanings as in the Factory and "Workshop Acts, 1901 to 1920."

By section 149 (1) of the Factory and Workshop Act, 1901, the expression "factory" has the following meaning assigned to it, so far as material to this appeal: "Subject to the provisions "of this section, the following expressions have in this Act the "meanings hereby assigned to them; that is to say:— . . . The "expression 'non-textile factory' means— . . . (*c*) any premises "wherein or within the close or curtilage or precincts of which "any manual labour is exercised by way of trade or for purposes "of gain in or incidental to any of the following purposes,

[15] [1952] A.C. 189; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.

[16] [1957] A.C. 65; [1956] 2 W.L.R. 1053; [1956] 2 All E.R. 176.

" namely—(i) the making of any article or part of any article; " or (ii) the altering, repairing, ornamenting or finishing of any " article; or (iii) the adapting for sale of any article, and wherein " or within the close or curtilage or precincts of which steam, " water or other mechanical power is used in aid of the manu- " facturing process carried on there. The expression ' factory ' " means textile factory and non-textile factory or either of those " descriptions of factories."

The Lands Tribunal Act, 1949, provides, by section 3 (4): " A " decision of the Lands Tribunal shall be final: Provided that any " person aggrieved by the decision as being erroneous in point of " law may . . . require the Tribunal to state and sign a case for " the decision of the court."

My Lords, it is not in dispute that the Aldenham depot is a ' factory " within the definition contained in section 149 (1) of the Factory and Workshop Act, 1901, but the tribunal in the present case found that the activities carried on by the appellants at the depot were the maintenance of their road vehicles within the meaning of section 3 (2) (*b*) of the 1928 Act and that therefore the depot was not an " industrial hereditament " within the definition in section 3 (1) of the same Act. The question stated by the tribunal for the decision of the court was " whether upon " the findings of fact he came to a correct decision in law," and that question can conveniently be divided into two parts: (1) Did the tribunal fall into any error of law in holding that the activities carried on by the appellants at the depot were the maintenance of their road vehicles? (2) If the tribunal fell into no such error in so holding, were the tribunal and the Court of Appeal right in holding that on the true construction of section 3 of the 1928 Act the depot is not " an industrial hereditament "?

Before considering the first question it is necessary to set out the facts upon which the decision of the tribunal was given. I find it impossible adequately to summarize the very clear findings of fact, and I think it is necessary to quote them at length, in order to give an accurate picture of the appellants' activities.

" The depot is registered as a factory under the Factory and " Workshop Acts.

" It was used at the material time for the periodical overhaul " of the omnibuses used by the appellants and for the repair of " major accidents suffered by such vehicles.

" The work of overhaul is divided between the depot and the " Chiswick works of the appellants. At the date of the proposal, " March 29, 1954, the overhaul work at the depot consisted of the " overhaul of the body only, the chassis being merely prepared " for dispatch to the Chiswick works for overhaul there, although " heavy repairs to the chassis frame were carried out at the depot.

" The overhaul of the appellants' vehicles is done to a pro- " gramme, each vehicle being completely overhauled every $3\frac{1}{2}$ " years, maintenance and repair work (other than in cases of " major accidents) in the intervening period being carried out at " the local garages of the appellants.

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"On arrival at the depot a vehicle is inspected and all parts "requiring attention are marked with chalk and entered on a "schedule. It is then taken to the body dismount shop where "the body is removed from the chassis by an overhead crane. "The chassis was then taken to the chassis preparation shop "where it was cleaned and made ready for despatch to the "Chiswick works for overhaul there. After overhaul it was "returned to the depot, but it was improbable that, on its return, "its former body would be replaced on it, since the chassis went "into stock and would in due course be drawn out and fixed to the "body next in turn for despatch. The body is taken to a piece of "machinery called an inverter which enables it to be turned on "its side for washing and for the carrying out of certain under-"floor and roof repairs.

"From the inverter the body is taken by crane to the body "repair shops. Here it is mounted on stilts which form a jig "and hold the body at a convenient height for working between "fixed gantries which afford convenient access at different levels. "All defective parts are removed and subsequently go to appro-"priate shops elsewhere for reconditioning (if possible). The "parts so removed are replaced by new or reconditioned parts "taken by the men engaged on the job from stocks stored in "what are known as cafeteria racks running along the side of "the shop. The extent of the replacements carried out are, on "the average, 1,940 pieces out of a total of 7,500 which consti-"tute the total body; of these 1,940 pieces some 1,740 are "reconditioned and subsequently re-used. These numbers ex-"clude nuts, bolts and screws.

"The body having been reintegrated, is then taken by over-"head crane to another inverter, where a coating of protective "paint is applied to the underside.

"From there it is carried to the mount shop where it is "again mounted on a chassis, which has been overhauled at "Chiswick and returned to the depot.

"It is then towed to the rectification shop, where it is "inspected. It then goes out on a road test and returns to "the rectification shop for the correction of any faults shown "on the road test.

"From there it is towed to the preparation shop where it "is prepared for painting and where certain minor painting, "such as the cream line, is put in by hand. Here, in addition "to rubbing down, masks or protective coverings are applied to "those parts not to be painted the familiar red or green.

"In certain cases where the paint work is very bad, such "as cases where small dents have been beaten out in situ, the "vehicle may have previously been taken through the special "preparation shop where the existing paint is chemically re-"moved.

"After preparation the vehicle goes to the paint shop where "it is painted with one coat of colour by electrical sprays hand

" operated. It is there air dried and the transfers are put on " during this drying period. It then receives two coats of varnish " and is oven dried after each coat.

" The vehicle then goes to the finishing shop where the re- " conditioned cushions and upholstery are fitted and any small " touchings up and finishings are carried out.

" Finally the vehicle goes to the licensing garage where it is " inspected by the transport executive rolling stock engineer and " the licensing authorities before it goes back to its own garage. " For the purposes of the taxation officers, the bonnet number, " the maker's chassis number and the registration number have " to agree, and in view of the separation of body and chassis " in the early stages of the overhaul and the substitution of a " different reconditioned chassis at a later stage, body and chassis " are renumbered so as to correspond with the licence.

" The whole process of overhaul of a vehicle from the time " it enters to the time it leaves the depot occupies about three " weeks.

"So far as major accident repairs are concerned, of which " during the year ended March, 1954, there were an average of " between ten and twenty vehicles a week, the vehicle is first " inspected and the necessary body repair work carried out in " the accident repair shops and any necessary repainting con- " sequent upon such repairs done in the accident painting shop. " Damage to the chassis would also be repaired in the depot " in the development shops.

" Even if a vehicle incurred a major accident within a short " period before it was due for overhaul, it would go first to the " accident repair shop for the accident damage to be repaired " before it underwent overhaul though in such cases the re- " painting would be omitted in view of the complete repainting " which each overhauled vehicle receives.

" All defective parts whether removed from a body in the " body repair shops or the accident repair shops are first exam- " ined to see if they are capable of reconditioning. If they are " so fit they are collected in the pre-repair stores where they " are made up into batches and sent to the appropriate shops " in the depot where they are reconditioned. After recondition- " ing, metal parts are stove enamelled and timber parts hand " painted. They are again inspected and then go to the progress " body repair stores which together with the main stores, which " are used primarily for new material, form the reservoir from " which the cafeteria racks are kept stocked.

" There are two of the reconditioning shops of which special " mention may be made, the trimmers' shop and the board and " blinds shop. In the former the cushions and upholstery are " cleaned, repaired and rebuilt, and the leathercloth used for " lining the omnibus and linoleum and cork tiles are cut to the " necessary size from new material. In certain cases it proves " necessary for new moquette to be used as the outer cover

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" for the cushions and squabs (or backs of the seats), and this " also is cut out and fitted in this shop. The extent of the " reconditioning of the cushions and squabs varies from cleaning " and a repaint of the back of the squab to a complete stripping " to pieces and reassembling as in the original manufacture.

" In the boards and blinds shop, destination blinds are re- " painted or reconditioned. During 1954 500 new blinds were " made and 370 reconditioned on an average each week.

" There was also at the depot a plant shop used for the " maintenance and servicing of the plant used on the premises " and the manufacture of certain plant and equipment for such " use.

" In 1955 there had been removed to the depot the recon- " ditioning of chassis which had formerly been carried out at " Chiswick. The defective parts were sent to Chiswick for " reconditioning and after reconditioning returned to the depot.

" Chassis reconditioned at the depot have defective parts re- " placed from the store to which the reconditioned parts are " returned."

It will be observed, my Lords, that in the boards and blinds shop and in the plant shop a certain amount of manufacture is carried on, but it was common ground between the parties that this manufacture was on such a small scale, compared with the other work carried on at the depot, that it should be disregarded by the application of the rule de minimis non curat lex. Thus your Lordships can approach the first of the two questions already stated upon the footing that either the whole of the depot is used for the maintenance of the appellants' road vehicles, or no part thereof is so used.

Sir Andrew Clark, for the appellants, submitted that the word " maintenance " should be given a narrow meaning in section 3 (2) (*b*) of the 1928 Act, and referred your Lordships to section 151 (1) (vi) of the Factories Act, 1937. He did not, of course, submit that this section could be used for the purpose of construing the 1928 Act, but he did submit that the operations of " cleaning, washing, running repairs or minor adjust- " ments " set out in sub-clause (vi) of that section, with the addition of " oiling and greasing," were the operations covered by the word " maintenance " in section 3 (2) (*b*) of the 1928 Act.

My Lords, I cannot find any context which supports this argument, either in the 1928 Act as a whole or in section 3 thereof. Moreover, I can find no support for the argument in any of the cases to which reference was made at the hearing. The word " maintenance " is an English word in ordinary use, having no technical meaning and its meaning in section 3 (2) (*b*) of the 1928 Act was considered by this House in *Potteries Electric Traction Co. Ltd.* v. *Bailey*[1] and by the Lands

[1] [1931] A.C. 151; 47 T.L.R. 154.

Valuation Appeal Court in *Scottish Motor Traction Co. Ltd.* v. *Edinburgh Assessor.*[2]

In the former case this House decided that work done on the hereditament then in question (except as to one part thereof used as a paint shop) went beyond user for the maintenance of the vehicles of the Potteries company. It is, however, clear from the speeches of Lord Buckmaster and other noble and learned Lords that the decision was based on the fact that spare parts were manufactured on a large scale upon the premises. Lord Buckmaster said[3]: "It is said that these "hereditaments are used for maintenance of road vehicles, and "accordingly that they are disentitled to the benefit of the "statute. I find myself unable to accept this view having "regard to the findings in the special case. The fact that "spare parts are necessary for repairing omnibuses does not, "in my opinion, make the manufacture of the spare parts a "maintenance of the omnibus within the meaning of the statute. "The processes carried out are distinctly held in the special "case to be processes that are additional to ordinary main-"tenance. I think the word maintenance is a word sufficiently "well known in this connection to entitle us to rely upon the "special finding of the fact in the case. The finding that the "work done in the manufacture of all the various articles "specified, every one of which, as found in the case, would "have to be purchased by the appellants, if not made upon "their own premises, shows that in substance the work carried "on is the work of the manufacture of a large number of "articles incident to the construction and the maintenance of "a fleet of omnibuses. But the construction of an article needed "to maintain differs, in my opinion, from what is meant by "the word maintenance. . . . There is, however, one part "of the building that is specially used for a purpose that "obviously may be that of maintenance. It is that part which "is devoted to the painting of omnibuses. It was urged by "the appellants that there was nothing to show how much of "this painting was done by way of repair and how much is "original work, but in the workshops of an omnibus company "owning a fleet of 198 omnibuses there must be constant re-"painting required, and I think it is safe to assume that this "part of the hereditament is devoted to that object and not "entitled to the benefit of relief." The last passage makes it clear that Lord Buckmaster regarded the word "maintenance," as used in section 3 (2) (*b*) of the 1928 Act, as including work of repair.

In the *Scottish Motor Traction* case[4] the Lands Valuation Appeal Court (Lords Hunter, Sands and Fleming) upheld the decision of the Valuation Committee that the use of certain premises for "repairing, overhauling, and conditioning the

[2] 1931 S.C. 416.
[3] [1931] A.C. 151, 163–164.
[4] 1931 S.C. 416.

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"chassis and bodies of the appellants' buses" (to quote Lord Hunter [5]) was a use for the maintenance of the appellants' road vehicles within the meaning of section 3 (2) (*b*). The appeal court delayed giving judgment until the *Potteries* case [6] had been decided and reported, and Lord Sands observed [7]: "The premises are used for three purposes: (1) somewhat "extensive offices; (2) the repair of cars sent for that purpose "by outside customers; (3) 'repairing, overhauling, and recon-"'ditioning' the appellants' vehicles. The first is plainly a "non-industrial purpose. The second is covered by the pro-"vision excluding retail shops from the benefit of the Act. "The third is struck at by section 3 (2) of the 1928 Act as "being 'maintenance' of the company's road vehicles, unless, "and so far as the repairing, overhauling and reconditioning "involve such an amount of renewal as not to be fairly des-"cribed as maintenance of a vehicle." And the same learned judge observed, in regard to other premises [8]: "There is nothing "to show that the overhauling and reconditioning goes beyond "maintenance." The relevant facts in the *Scottish Motor Traction* case,[9] which has stood for twenty-seven years, strongly resemble the facts in the present case. I note that counsel for the respondent argued successfully [10]: "It was immaterial that "the work was carried out on a very large scale. The im-"portant point was that it was repair work, and not manu-"facture." I entirely agree with that observation. In my view the word "maintenance," in section 3 (2) (*b*) of the 1928 Act, covers repairing, overhauling and reconditioning of vehicles, so long as the work does not amount to reconstruction, and so long as no manufacture of new parts is carried out on a scale to which the de minimis rule cannot be applied. If this view is correct, it may often be difficult to draw the line between "maintenance" and "reconstruction." That is a matter of fact and degree, upon which different minds may arrive at different conclusions. See per Lord Fleming in the *Scottish Motor Traction* case.[11]

In the course of argument reference was made to the decisions in *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee* [12] and *London Passenger Transport Board* v. *Railway Assessment Authority* [13] (the *Charlton Works* case). I see no reason to doubt the correctness of each of these decisions upon the particular facts of the respective cases, but I cannot accept the passage in the judgment of Charles J. in the former case, where he contrasts "maintenance" with "overhaul." In my view the words "maintenance" and "overhaul" are not mutually exclusive.

In the present case the view of the tribunal was expressed

[5] 1931 S.C. 416, 421.
[6] [1931] A.C. 151.
[7] 1931 S.C. 416, 425.
[8] Ibid. 426.
[9] 1931 S.C. 416.
[10] Ibid. 420.
[11] Ibid. 430.
[12] (1933) 18 R. & I.T. 27.
[13] (1941) 13 D.R.A. 64.

as follows: "As in all questions of degree it is not easy to "say on which side of the line a certain process may be said "to fall, but after a careful consideration of the evidence in "the light of the view which I had of the depot on September "19, I have arrived at the decision that the processes carried "out at the depot can properly be described as the maintenance "of vehicles. It is, I think, material that at the material "dates no manufacture of new parts other than destination "blinds was taking place at the depot. The work done at "the depot was work necessary to maintain the vehicles as "a fleet in running condition, and the fact that, in order to "carry out the work more expeditiously and efficiently, recon-"ditioned parts were substituted in place of reconditioning and "replacing the defective parts actually removed cannot in my "view change what is in fact a repair into a reconstruction. "Nor I think can the fact that, instead of dealing with each "dented plate or mudguard as the damage occurs, such repairs "are carried out to a programme, alter the essential character "of the work. Looking at each of the individual processes "they seem to me to fall clearly within what, if one was "dealing with a single vehicle, might properly be called main-"tenance, and I do not think that because they are done "collectively to a fleet of vehicles they can be said to lose "this character."

I cannot find any error of law in the decision of the tribunal upon this point, and, reading the decision as a whole, I cannot find that the tribunal misconstrued the word "maintenance" as it is used in section 3 (2) (*b*) of the 1928 Act. I agree with the conclusion of the Court of Appeal, as expressed by the Master of the Rolls [14]: ". . . taking the matter as a whole, "viewing it broadly and in the light of the whole evidence, "it seems to me impossible to say that the conclusion which "the tribunal reached was not a reasonable conclusion justified "by the language of the section."

For these reasons, my Lords, I would uphold the decision of the tribunal that the work carried out by the appellants at the depot was maintenance of their road vehicles. What, then, is the effect of section 3 (2) (*b*) of the 1928 Act upon the position of the appellants? As I have already said, it is common ground that no distinction can be drawn between the work carried out upon different parts of this hereditament, and that the whole of the hereditament is a "factory" within the definition in section 149 of the Factory and Workshop Act, 1901. It is clear that if only part of the hereditament had been used for the maintenance of the appellants' road vehicles, that part would "be deemed not to form part of the factory or work-"shop" and would thus be excluded from the benefit of de-rating, even if the part so used were as much as nine-tenths of the whole. It is, however, contended by Sir Andrew Clark

[14] [1957] 1 W.L.R. 988, 1002; [1957] 3 All E.R. 126.

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that section 3 (2) (*b*) has no application to the present case, as not a part but the whole of the "factory or workshop" is used for the maintenance of the appellants' road vehicles; thus the whole of the hereditament is entitled to be derated. Such a result may fairly be described as absurd, and I think that the words of section 3 (2) (*b*) can properly be applied to a case in which the "place" used for either of the purposes mentioned in the subsection is the whole of the hereditament. I agree with the view expressed as follows by the Master of the Rolls, with the concurrence of Morris and Pearce L.JJ.[15]: "... according to the plain sense of the language, the paragraph is, I think, saying: 'any place'—and I emphasise the word '*any* place'—'used for the maintenance of road vehicles notwithstanding that it is'—and I paraphrase that, 'even though it be'—'within the close, the confines, of a factory, still, it is not to be deemed part of the factory; and if it so happens that the place is the whole, then none of it forms part of the factory and the whole is excluded.' I do not say the language is wholly happy, but I cannot find such a construction as I have given to be subversive of the meaning of the words used. I think that such a reading of the paragraph gives common sense and coherence to the two subsections read together."

The result is, in my opinion, that the depot is not an industrial hereditament within the definition in section 3 (1) of the 1928 Act, and this appeal should be dismissed with costs.

LORD REID. My Lords, the appellants can only succeed if their Aldenham depot is an industrial hereditament within the meaning of section 3 of the 1928 Act. There is no question of apportionment in this case: either the whole hereditament is industrial or none of it is. To be an industrial hereditament it must be occupied and used as a factory. Undoubtedly, it is a factory within the meaning of the Factory and Workshop Act, 1901, but section 3 of the 1928 Act adopts the definition of factory in the 1901 Act subject to limitations. I do not think that we are concerned with the limitations contained in the provisions to section 3 (1): proviso (*f*) is not very easy to interpret but it does not appear to me to have any application to this case. But the limitation contained in section 3 (2) (*b*) is of crucial importance. The subsection is in these terms: [His Lordship read the subsection and continued:]

The question in this case is whether the provisions of this subsection prevent the appellants' premises from being an industrial hereditament and therefore exclude derating. The first argument is that the subsection cannot apply because the work carried on in these premises is not "maintenance" of the appellants' vehicles. It is said that maintenance in this context does

[15] [1957] 1 W.L.R. 988, 997.

not include repairs but only includes such minor operations as oiling, greasing, inflating tyres, and perhaps making adjustments and cleaning. The structure and wording of section 3 are such that at first sight at least this argument is attractive.

The definition of "factory" in the 1901 Act is such that, if what I may call factory work is done in only part of a hereditament, or of a "close or curtilage or precincts," it brings within the factory not only those areas where factory work is done but also other areas within the precincts where no factory work is done. Looking to the purposes of the Factories Acts this is intelligible, but looking to the purposes of the derating legislation it is equally intelligible that areas where no factory work is done should not be derated merely because they are within the same precincts as the actual factory. What I have called factory work includes "(ii) the altering, repairing, ornamenting or finishing of "any article," and these terms cannot be read in any narrow sense.

If "maintenance" could be read as limited to minor operations which do not amount to altering, repairing or ornamenting vehicles, then subsection (2) (*b*) would be dealing only with places where no factory work is done, and would simply provide that such places, though technically within a factory by reason of the 1901 definition, are not to be part of a factory for the purposes of the 1928 Act. But I cannot accept that argument because, in my judgment, it is not consistent with the decision of this House in *Potteries Electric Traction Co. Ltd.* v. *Bailey*.[16] It has long been established practice that any decision of this House in a previous case on a question of law, such as the interpretation of a statute, shall be regarded as binding, and shall be followed, whether or not the question was adequately argued or considered, and however much your Lordships may disagree with the decision. I would not myself be against a modification of this strict practice, but so long as it exists I do not think that I am entitled to depart from it.

I have had the advantage of reading the speech about to be delivered by my noble and learned friend, Lord Keith of Avonholm. I agree with his analysis of that case and shall not add to it. But I think that that case leaves open the question whether maintenance in this context is wide enough to cover all kinds of repair, however extensive, or whether it should be limited to some particular kinds of repair. This question appears to me to depend on the proper construction of the word "maintenance" in the context of this subsection, and that must be a pure question of law. Once it is decided that maintenance includes at least some kinds of repair I can see no good reason for holding that any particular kind of repair is excluded. It is not suggested that maintenance in this context has any technical meaning. "Maintenance" is an ordinary word of the English language, and, if it includes doing a few repairs at one time and then a few

[16] [1931] A.C. 151.

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more at another time, I do not see how the operation could cease to be maintenance if it is found convenient to do a large number of repairs at the same time. Nor do I see any proper distinction between different kinds of repairs, or between repairs which are done with simple equipment and repairs which are more conveniently done in a fully equipped workshop. But reconstruction which goes beyond producing a repaired vehicle, and in effect produces a different vehicle, may be another matter. I do not think, however, that it would be reasonable to hold that the operations in the present case go beyond repair and amount to reconstruction. It is true that, as the bodies of the vehicles dealt with are interchangeable, it is generally found convenient not to replace the same body on the same chassis. That is the only feature in the case which could, to my mind, be said to point to reconstruction, but it would not appear to me to be reasonable to attach crucial importance to this point. I am therefore of opinion that the facts found in this case have rightly been held to come within the scope of maintenance.

But that does not end the case. Two arguments were submitted to the effect that, even if these premises were wholly used for maintenance, they should nevertheless be derated. First it is said that the language used in subsection (2) (*b*) is such that it can only apply where the premises used for "housing or maintenance of his road vehicles . . ." are part of a larger hereditament, the other part being used for other purposes coming within the definition of factory purposes. In the present case, the whole of the hereditament is used for repair, i.e., maintenance of the appellants' vehicles, and it is argued that it is impossible to make the language of the subsection apply to it. If that were so it would lead to an absurd result: if a part—even 95 per cent.—were used for repairing vehicles the subsection would apply and that part would not be derated, but if the whole were so used the subsection would not apply and it would be derated. It is therefore necessary to examine the language closely to see whether it is capable of being read in a way which would avoid this absurdity.

On any view, the subsection is awkwardly drafted. The last part adopts the definition of "factory" in the 1901 Act "save as aforesaid," and indicates that the earlier part of the subsection is to be read into the 1901 definition so as to narrow its scope. But the earlier part of the subsection is drafted in a form hardly appropriate for this purpose. The use of the word "notwithstanding" in the earlier part of the subsection is important. It must, I think, have been used on the assumption that if the premises used for maintenance, etc., stood by themselves as a separate hereditament, those premises would undoubtedly not be entitled to derating. To say that certain premises shall not be derated (which is the effect of this subsection read with section 4) notwithstanding that they are within the precincts of a factory clearly assumes that they would not be

derated if they stood by themselves, and, although this may be going to the extreme limit of what is permissible as a matter of construction, I am prepared to hold that this subsection covers the present case by clear implication. In a situation so confused I attach little importance to the verbal criticism that the words used are "form part of *the* factory" instead of "form part of *a* "factory."

The second argument is quite different. Take a case where subsection (2) (*b*) clearly applies, the premises used for maintenance being within the precincts of a factory. Then it is argued that the subsection does not say that those premises are not to be derated: it merely says that they are to be excised from the factory. The premises must then be re-examined as a separate entity: if they are not by themselves a factory, they are not derated, but if they are in themselves a factory, then they are entitled to be derated. And, if that is so where the premises used for maintenance are within the precincts of a factory, it must equally be so if subsection (2) (*b*) is held to apply to the present case. I trust that that is a fair statement of the argument. In my opinion, that argument fails because it fails to take account of section 4. I shall not elaborate the point because it seems to me to be clear that the effect of section 4 is not to make a separate hereditament of a part of a factory which by reason of section 3 (2) (*b*) is deemed not to form part of the factory. All that section 4 does is to provide for the valuation of the whole original hereditament in two parts. The part affected by section 3 (2) (*b*) does not get the benefit of derating but the rest does, and then the valuation of the two parts are added together to make the valuation of the whole original hereditament. So there is no room for a re-examination of the part affected by section 3 (2) (*b*) to see whether or not it would be a factory if it stood by itself.

For these reasons I agree that this appeal should be dismissed.

LORD KEITH OF AVONHOLM. My Lords, the operations conducted by the appellants at their Aldenham depot have been described in full by my noble and learned friend on the Woolsack. They may be described broadly as amounting to repair and overhaul of omnibus bodies including the renovation of seat upholstery and the repainting of the bodies. The work might indeed be called major repair and overhaul though that, I think, does not affect the issue. Nor does it, I think, matter that the work covers both repair due to ordinary wear and tear and repair due to major accidents. What is material is that no manufacturing operations are carried on at the depot, apart from the making of a negligible quantity of destination blinds, although reconditioning of defective parts removed from the omnibuses takes place.

The first point taken for the appellants was that these repair and overhaul operations did not amount to maintenance of road vehicles within the meaning of subsection (2) of section 3 of the Rating and Valuation (Apportionment) Act, 1928, as amended by

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the Local Government Act, 1929, section 69. Maintenance, it was said, must be confined to such operations as washing, cleaning, oiling, greasing and day-to-day minor repairs and adjustments. This was referred to as ordinary maintenance, as contrasted with maintenance that might extend to major repairs, overhauls and renovation. Much of this argument was based upon language used in the case of the *Potteries Electric Traction Co. Ltd.*[17] in this House.

My Lords, there is nothing said in that case which, in my opinion, supports this contention and there is much in the case which is against it. Apart from work done in a paint shop, to which I shall refer in a moment, it is clear that the operations carried out on the premises in that case were in the main manufacturing operations of a very extensive kind. It is only necessary to read the statement of facts as given in the report of the case in the Court of Appeal[18] to realise how predominant were the manufacturing operations carried on and how inextricably mixed with any repairs done on the premises. Lord Buckmaster, after explaining that in substance the work carried on was the work of the manufacture of a large number of articles incident to the construction and the maintenance of a fleet of omnibuses, said[19]: "But the construction of an article needed to maintain "differs in my opinion from what is meant by the word 'main-"'tenance' and, as already decided, it is the purpose to which "the premises are put and not the purpose to which their "products are devoted that is the question to be regarded." Lord Dunedin said[20]: "Maintenance is taken along with housing, "and points, I think, to something done to the vehicle on the "premises. . . . The ultimate fate of the part made is to main-"tain a vehicle. That does not show that maintenance is "done on the hereditament." Lord Warrington of Clyffe said[21]: "With one small exception there is in my opinion nothing in the "detailed description of the work which is inconsistent with the "general conclusion of the learned recorder," which was that the premises were an industrial hereditament. Lord Tomlin after referring to the words in section 3 (2), a "place used by the "occupier for the housing or maintenance of his road vehicles "or as stables," said[22]: "The manufacture of spare parts for "use elsewhere is not in my view within the contemplation of "the subsection. The findings of fact of the learned recorder "make it plain in my opinion that the premises (other than the "paint shop) are not used for maintenance in the sense which "I have indicated." Lord Thankerton concurred in the opinion of Lord Buckmaster. All their Lordships agreed, however, that the paint shop was used for the maintenance of vehicles as being devoted to the repair of vehicles and should be excluded from the industrial column of the valuation list. Lord Dunedin said[23]:

[17] [1931] A.C. 151.
[18] [1931] 1 K.B. 385, 390; 46 T.L.R. 601.
[19] [1931] A.C. 151, 163–164.
[20] Ibid. 169.
[21] Ibid. 175.
[22] Ibid. 180.
[23] Ibid. 169.

" . . . it seems pretty clear that the painting shop is used for " the purposes of real maintenance." Lord Warrington of Clyffe said [24]: " In his [the recorder's] description of the paint shop he " says it is used amongst other things for painting omnibuses, " lorries and cars. This is, I think, a matter of ordinary main- " tenance and the paint shop should therefore have been excluded " from the factory." This would not have been so, of course, if the paint shop had been devoted wholly to the painting of omnibus bodies made on the premises. The painting would then have been incidental to, and part and parcel of, a manufacturing operation. The finding, however, in the case was: " The paint " shop was used for painting omnibuses, lorries and cars and all " new woodwork produced in the body-building and wood-working " shop." From the opinions of Lord Buckmaster and Lord Warrington the House appears to have proceeded on the view that the paint shop was primarily used for the repainting of the fleet of omnibuses and other vehicles.

My Lords, I have devoted some time to the view taken of the facts of that case, but it is important to notice the issue which was before the House. It was whether it was relevant to consider the purpose for which the various parts were being made. It was the case for the revenue officer that the articles were being made for the repair of the omnibuses and that this was therefore maintenance. The judgment of the House was that it was what was actually done on the premises that was relevant and that the ultimate purpose or destination of the articles made on the premises was immaterial. This is seen in the passages I have already quoted and is summed up in one sentence from the speech of Lord Buckmaster [25]: " But the construction of an article " needed to maintain differs in my opinion from what is meant " by the word ' maintenance ' and, as already decided, it is the " purpose to which the premises are put and not the purpose to " which their products are devoted that is the question to be " regarded." My Lords, if repairs, whether major or minor, were not maintenance it was idle to raise or to decide this issue. Making articles for repair purposes could never be maintenance if making repairs was not of itself maintenance. In my opinion, there underlies all the speeches of their Lordships in that case an acceptance of the view that repairing of vehicles was maintenance. And that view, I think, became a matter of decision in their treatment of the paint shop in that case. The repainting of car and omnibus bodies cannot be treated as a matter of day-to-day maintenance. And if not, I see no ground for excluding any other type of repair which does not result in reconstruction, or the production of a new article. This was the view also of the Lands Valuation Appeal Court in Scotland in *Scottish Motor Traction Co. Ltd.* v. *Edinburgh Assessor*,[26] given after consideration of the decision of the House of Lords in the *Potteries Electric Traction*

[24] [1931] A.C. 151, 163–164, 175.
[25] Ibid. 163–164.
[26] 1931 S.C. 416.

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Co.'s case.[27] Two of the premises in that case were used partly for the repair, overhaul and reconditioning of the bodies of buses belonging to the occupiers of the premises and partly for similar work on motor vehicles of outsiders. So far as work was done for customers, that was held to be work in the nature of the business of a retail shop under section 3 (1) of the Act; and in so far as it was work on the occupier's own vehicles, to be maintenance of his vehicles under section 3 (2). In my opinion, that case was rightly decided.

It was submitted that what was "maintenance" in the sense of the Act was a question of law and not a question of fact. That may be so, but, once it is decided that maintenance includes repair in the wide sense I have indicated, the question of law has been largely, if not entirely, settled, and the only question left is whether what was done is repair or amounts to something more, namely the remaking of a new article. That may, in certain cases where the facts are equivocal as between repair and reconstruction, raise questions of fact and degree which are essentially within the province of the fact-finding tribunal to determine, as has been observed by the learned Master of the Rolls in this case and also by Lord Fleming in the *Scottish Motor Traction Co.* case.[28] This would seem to have been the position in the case of *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee*[29] to which we were referred. Certain operations described there as overhaul of road vehicles were held by the assessment committee not to be maintenance. On the other hand, the committee held that repair of vehicles which consisted in remedying all kinds of specific defects was maintenance. It was only the question of the overhauling operations on which appeal was taken to the Divisional Court and the court, treating the matter as one of fact and degree, refused to disturb the determination of the committee. There is no magic in the word "overhaul." The question is what is the nature of the operations. I agree with the learned Master of the Rolls that there is no ground on which it can be said that the Lands Tribunal here was not entitled to find that the overhauling done here was maintenance.

I turn now to the other point in the case. In section 3 (1) of the Act "industrial hereditament" is defined as "a hereditament "(not being a freight-transport hereditament) occupied and used "... subject as hereinafter provided, as a factory or workshop." There is nothing, in my opinion, in the proviso to that subsection which excludes the appellants' depot from being an industrial hereditament. But passing to subsection (2) (*b*) of the Act, as amended, we find that any place used by the occupier for, inter alia, the maintenance of his road vehicles, shall, "notwith- "standing that it is situate within the close, curtilage or precincts "forming a factory ... and used in connexion therewith, be

[27] [1931] A.C. 151.
[28] 1931 S.C. 416.
[29] 18 R. & I.T. 77.

" deemed not to form part of the factory . . . but save as afore-" said, the expressions ' factory ' and ' workshop ' have respec-" tively the same meanings as in the Factory and Workshop " Acts, 1901 to 1920." It is said that if 100 per cent. of a place used by the occupier as a factory is used for the maintenance of his road vehicles this subsection does not apply. We must find that the place used for the maintenance of road vehicles is part of a larger unit. My Lords, if 90 per cent. of a factory is to be deemed not to be part of a factory because it is used for the maintenance of the road vehicles of the occupier I have difficulty in seeing that a place used to the extent of 100 per cent. for the maintenance of the occupier's vehicles is a factory within the meaning of the subsection. The matter may be put in another way. If I ask what part of this factory is used for the maintenance of the road vehicles of the occupier and the answer is 100 per cent. then that part is to be deemed not to form part of the factory. To answer that 100 per cent. is not part of a whole reduces the situation, as the learned Master of the Rolls has indicated, to an absurdity. Whatever part is used for the maintenance of the occupier's vehicles is to be deemed not to form part of his factory. That fixes the meaning or extent of the factory in any particular case and, if the whole is so used, then none of it is to be deemed to be a factory. The point is a new one and did not arise in the *Scottish Motor Traction Co.* case [30] because there part of the premises was used for the repair of the vehicles of outsiders. So part was disqualified for derating as being business of the nature of a retail shop and part as used for maintenance of the occupier's own vehicles. It should be noted, however, that in the *Potteries Electric Traction Co.'s* case [31] the whole of the premises would have been excluded from derating under section 3 (2) (*b*) on the respondent's argument in that case. This would have provided a very short answer on the appeal if the contention of the appellants in the present case were sound. Though the point is novel and the circumstances that give rise to it perhaps unusual the contentions of the appellants must, I think, for the reasons I have given, fail. If the whole is to be excised as being deemed not to form part of the appellant's factory, that, in my opinion, is the end of the case.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, I have had the advantage of reading the opinion just delivered by my noble and learned friend on the Woolsack. I have nothing I wish to add on the question whether there was an error of law in the tribunal's finding as to maintenance. I would wish to add a few words on the construction of section 3 (2) (*b*) of the 1928 Act. The appellants are right in their submission that the wording is related to the case where the place used for the housing or maintenance

[30] 1931 S.C. 416. [31] [1931] A.C. 151.

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of vehicles is situated within a factory. The word "notwithstanding" is, however, I think the key to the solution of the problem. It means that a place used solely for the housing and maintenance of vehicles is a fortiori not a factory or workshop within section 3 (1). If this had not been the intended implication of the provision the wording would have been different. It would have run—"any place used by the occupier for the "housing or maintenance of his road vehicles situate within the "close, curtilage or precincts forming a factory or workshop and "used in connection therewith shall be deemed not to form," etc.

I agree that the appeal should be dismissed.

Lord Denning. My Lords, no one can doubt that this large depot of the London Transport Executive is a "factory." It is fully equipped with overhead cranes and machinery of all kinds. Many buses come in for overhaul and reconditioning. Every bus is taken to pieces—every part examined, repaired, reconditioned, or renewed—and the parts from many different buses are reassembled to form other buses. No bus that comes out of the depot can be identified with one that went in.

It is surprising to find that a depot which is so obviously a "factory" should not be regarded as an "industrial hereditament"; and I must say I view with some suspicion an interpretation of the statute which leads to such a result. The crucial section on which it depends is section 3 (2) (*b*) of the Rating and Valuation (Apportionment) Act, 1928: but, as this refers back to the Factory and Workshops Act, 1901, it is necessary to consider that Act as well. The Factories Act, 1937, does not affect the question: see section 159 (3) of that Act.

The best way, I think, of understanding these statutes is to take an instance which the legislature clearly had in mind, just as I said in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners*.[32] The most useful instance for present purposes is to take a manufacturing company which has a large main factory equipped with machinery at which it makes articles. It sends them out to its wholesale customers by its own delivery vans. It houses its vans on the premises and has a maintenance shop in which it does ordinary maintenance so as to keep them in running order. It has a canteen for the workers in the factory; and offices and a restaurant for the executive staff. It happens to have a small workshop in the grounds, too, where it makes different things unconnected with the main factory. The whole of the company's business is carried on in one large area enclosed by a ring fence.

In such a typical case the effect of the Factory and Workshops Act, 1901, is this:

1. The factory building itself is, of course, a factory; and, in addition, every other building and place within the ring fence is prima facie to be regarded as part of "the factory" because it is

[32] [1958] 2 W.L.R. 336, 347; [1958] 1 All E.R. 406.

" within the close or curtilage or precincts " of it, see section 149 (1) (*c*) and *Street* v. *British Electricity Authority*.[33] The garage for housing the motor-vans is, therefore, to be regarded as part of " the factory." So is a coach-house for horse-drawn vans. And stables for the horses. The maintenance shop (in which the vans are washed, cleaned and oiled, brakes adjusted, and so forth) is likewise to be regarded as part of " the factory." So, also, is the canteen for the workers who operate the machinery in the factory, see *London Co-operative Society Ltd.* v. *Southern Essex Assessment Committee*.[34] But none of these—the garage, coach-house, stables, maintenance shop, or canteen—would be regarded as factories in themselves. It is only because each is part of a larger factory area that each becomes part of " the factory."

2. The offices and restaurant for the executive staff stand, however, on a different footing. Notwithstanding that they are " within the close, curtilage or precincts," they are not to be deemed part of " the factory." The reason is because they are solely used for some purpose other than the manufacturing process, and are taken out of " the factory " by the first part of section 149 (4): see *Thomas* v. *British Thomson-Houston Co. Ltd.*[35] And, of course, considered separately, they are not a factory.

3. The small workshop where the company makes different things is deemed not to be part of " *the* factory," but is to " be " deemed *a* separate factory " under the second part of section 149 (4): see *Thorogood* v. *Van den Berghs & Jurgens Ltd.*[36]

In such a typical case the effect of the derating provisions of the Rating and Valuation (Apportionment) Act, 1928, is this:

1. The whole of the enclosed area within the ring fence is to be treated for rating purposes as a single hereditament: see *Gilbert* (*Valuation Officer*) v. *Hickinbottom & Sons Ltd.*[37]

2. The whole of the hereditament is prima facie to be regarded as an " industrial hereditament " within section 3 (1) of the 1928 Act. The reason is because, when you look at it as a whole—as you must—you find it is primarily occupied and used for factory purposes and not for any of the purposes in provisos (*a*) to (*f*): see *Dalziel Co-operative Society* v. *Motherwell Assessor*.[38]

3. But in preparing the valuation list, an apportionment must be made of the annual value of the hereditament so as to apportion it between the use for industrial purposes and the use for other purposes, see section 4 (1).

4. In making the apportionment, the main factory building itself is to be classed as " industrial." So must every other building and place within the enclosed area unless it is, by

[33] [1952] 2 Q.B. 399, 409; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.
[34] [1942] 1 K.B. 53; [1942] 3 All E.R. 252.
[35] [1953] 1 W.L.R. 67; [1953] 1 All E.R. 29.
[36] [1951] 2 K.B. 537, 546; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.
[37] [1956] 2 Q.B. 40, 48; [1956] 2 W.L.R. 952; [1956] 2 All E.R. 101.
[38] 1932 S.C. 413, 419.

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statute, taken out of the category of a factory: see section 4 (2) (*a*). The canteen for the workers is, therefore, to be classed as "industrial." But the offices and restaurant for the executive staff are to be classed as "non-industrial," because they are taken out of "the factory" by the Factory Act, 1901. And the garage and maintenance shop are to be classed as "non-industrial," because they are taken out of "the factory" by the Rating Act, 1928. But the small workshop is to be classed as "industrial" because it is deemed to be a separate factory under the Factory Act, 1901.

That is how the Acts operate in a typical case. The important thing to notice is that there is one whole enclosed factory area—a single hereditament—which is bound to be classed as an "industrial hereditament" except in so far as, by statute, parts of it are to be excluded. We are here concerned with the excluding sections, and in particular with section 149 (4) of the Factory Act, 1901, and section 3 (2) (*b*) of the Rating Act, 1928. A perusal of these sections shows, to my mind, quite clearly that they are both dealing with *parts* of a larger whole hereditament, and not with a whole hereditament itself. The wording of both sections is precise and definite on the point. I will set them next to one another to show how close to one another they are and italicize the material words:

Section 149 (4) of the Act of 1901 provides: "Where a *place* "*situate within the close, curtilage or precincts forming a factory* "*or workshop* is solely used for some purpose other than the "manufacturing process or handicraft carried on in the factory or "workshop, that *place shall not be deemed to form part of the* "*factory or workshop for the purposes of this Act*, but shall, if "otherwise it would be a factory or workshop, be deemed to be a "separate factory or workshop."

Section 3 (2) (*b*) of the Act of 1928 provides: "*for the purposes* "*of this Act* any *place* used by the occupier for the housing or "maintenance of his road vehicles or as stables *shall*, notwith-"standing that it is *situate within the close, curtilage or precincts* "*forming a factory or workshop* and used in connection therewith, "*be deemed not to form part of the factory or workshop.*"

No one reading those two sections can doubt what Parliament intended. In section 149 (4) it envisaged a place within a factory—such as the *offices* in my illustration—and enacted that notwithstanding that those offices were within the larger whole factory area, nevertheless they were to be excluded from "the "factory." In section 3 (2) (*b*) it envisaged a place within a factory—such as *the garage and maintenance shop* in my illustration—and enacted that notwithstanding that they were within the larger whole factory area and, indeed, part of "the factory" for Factory Act purposes, nevertheless they were to be excluded from "the factory" for Rating Act purposes.

I see no possible justification in either section for supposing that Parliament intended to deal with a single hereditament

which was not part of a larger whole. It certainly did not do so in section 149 (4). And likewise in section 3 (2) (*b*) which contains identical wording on the point. Section 3 (2) (*b*) cannot be made to apply to a single hereditament except by rewriting it—and filling in a supposed gap—so as to make it say that the place in question "shall be deemed not (here "insert *to be nor*) to form part of (here strike out 'the' and "put *a*) factory or workshop." No such drastic filling in of a gap—or alteration of words—is permissible to any court unless there is no other way of making sense of it.

The Master of the Rolls saw the difficulty in making this rewriting but thought that it was the only way in which absurdity could be avoided. But I would suggest that there is nothing unreasonable or absurd about the section—provided always that you construe the word "maintenance" properly. The difficulty has arisen solely because the word "maintenance" has not been properly construed.

Let me say, then, how the word "maintenance" should, in my opinion, be construed. Its meaning can be gleaned from its context. It is used in company with two associated words "housing" and "stables": and it is to be known by its associates. Noscitur a sociis. The one thing in common about "housing" and "stables" is that neither of them are "fac-"tories" by themselves in any sense of the word. Each only becomes part of a "factory" by coming within an enclosed factory area. Likewise, it seems to me that a place for "main-"tenance" of vehicles, in section 3 (2) (*b*), denotes a place which is not by itself a "factory" but only becomes part of a factory by coming within an enclosed factory area—such as the maintenance shop in my illustration.

"Maintenance" in this section means, I think, *ordinary maintenance*. It means washing, cleaning, oiling, minor adjustments and running repairs. A garage where minor repairs of that kind are done is not on that account to be reckoned as a "factory" with all that that entails. Just as a kitchen of a restaurant is not to be regarded as a "factory" simply because articles are altered, ornamented or finished in it, see *Wood* v. *London County Council*[39]: so also a garage is not to be regarded as a factory because ordinary maintenance is done there: see *Potteries Electric Traction Co. Ltd.* v. *Bailey*,[40] per Lord Warrington. Such is clearly the position since 1937 (see section 151 (1) (vi) of the Act of 1937) and I see no reason to doubt that it was the same under the Act of 1901. In this respect the Act of 1937 only declares and clarifies the law. It does not alter it.

When "maintenance" is so construed, there is nothing unreasonable or absurd in the Act. Every garage which does the *ordinary maintenance* of road vehicles (as I have described it)

[39] [1941] 2 K.B. 232; 57 T.L.R. 499; [1941] 3 All E.R. 1.

[40] [1931] A.C. 151, 173, 175.

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must bear the full rates. It is on an equal footing with every other such garage. No such garage is entitled to be derated, no matter whether it is occupied and used by a carrier or haulage contractor (who has no factory) or by a manufacturer (who has a factory) and no matter whether it is a single hereditament or part of a larger whole. The reason is because, when occupied and used as a single hereditament, it is not a "factory" within the Factory Act: and when it is part of a larger factory area, it is taken out of "the factory" by section 3 (2) (*b*) of the Rating Act. That, indeed, is the very object of section 3 (2) (*b*). It is to see that a manufacturer (who has a factory) is not in a better position—so far as the rating of his garage is concerned—than a carrier or haulage contractor (who has no factory). If it were not for section 3 (2) (*b*), the manufacturer who garages his fleet of lorries in his own works would be entitled to have his garage derated—which would be very unfair to the carriers and hauliers who have similar garages liable to full rates.

So much for garages. But repair shops—where major repairs are done—stand on a different footing. These are "factories" within the Factory Act. I am quite sure that Parliament did not mean to put a carrier or haulier—who has his own repair shop—in a worse position than a repairing contractor with a like shop. As I read this Act, every workshop which does major repairs to road vehicles (including overhauling and reconditioning)—as distinct from ordinary maintenance—is entitled to be derated. (I am speaking, of course, only of workshops proper—not of those which are primarily occupied for the purposes of a "retail shop.") Every such workshop is entitled to be derated, no matter whether it is occupied and used by a carrier or haulage contractor for the repair of his own vehicles, or by one company for the repair of another company's vehicles, and no matter whether it is a single hereditament or part of a larger whole. If it is a single hereditament, it is a "factory" in itself. If it is part of a larger factory area, it is, again, to be reckoned as a "factory," either as being "part" of the larger factory, or as being "deemed *to be a* separate "factory" within the second part of section 149 (4), see *Thurogood* v. *Van den Berghs & Jurgens Ltd.*[41] This explains the use of the words "neither *to be nor* to form part of *a* "factory" in section 4 (2) (*a*) of the 1928 Act. If the words "neither to be" were omitted, every workshop within a larger factory area—of such a character that it is deemed not to form part of the factory but to be a separate factory in itself—would rank as non-industrial, which would be absurd.

It is significant that the words "neither to be" are inserted in section 4 (2) (*a*)—and also the word "a" is used instead of "the"—whereas there is nothing of the kind in section

[41] [1951] 2 K.B. 537.

3 (2) (*b*). This affords strong support for the construction I have put upon section 3 (2) (*b*), namely, that it applies only to a part of a larger whole. It is also worth noticing that the Act itself in section 5 (2) uses "maintenance" as different from "repair."

Thus the whole Act fits together as a consistent whole when "maintenance" is construed as I have suggested. But if it is treated as having so wide a meaning as to include overhauling and reconditioning and major repairs (as it was treated by the Railway and Canal Commission in the *Charlton* case[42] and by the Land Valuation Court in the *Scottish Motor Traction* case,[43] you find yourself in these difficulties:

(1) If you take section 3 (2) (*b*) in its natural meaning you are forced into the absurdity (which the Master of the Rolls pointed out) of saying that if a workshop doing major repairs is a single hereditament, it will be derated, but if it is 90 per cent. of a larger factory hereditament, it will not be derated. The only way of avoiding this absurdity is to write words into section 3 (2) (*b*) for which there is no justification.

(2) Even if you rewrite section 3 (2) (*b*) in that way, you are still forced into the equal absurdity of saying that if a workshop is used by the occupier for doing major repairs to his own vehicles, it will not be derated; but if it is used by him for doing major repairs to someone else's vehicles, it will be derated. That cannot have been intended by Parliament. It means that a haulage contractor can always get his premises derated by forming one company to own the vehicles and another company to occupy the workshop. Derating should depend on the use to which the premises are put, not on the ownership of the vehicles.

(3) In any case you give so much elasticity to the word "maintenance" that you open the door to inequality of treatment as between similar premises up and down the country. No one can be satisfied with a system of adjudication which results in the derating of the workshops in *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee*[44]: and in the full rating of the workshops in the *Charlton* case,[45] when in truth no sensible distinction can be drawn on the facts

In the result, I am clearly of opinion that the right construction of section 3 (2) (*b*) is that which I have stated. But it is said that there is a decision of this House which prevents your Lordships adopting this construction, namely, the decision about the paint shop in *Potteries Electric Traction Co. Ltd.* v. *Bailey*.[46] That is, to my mind, a decision on the particular facts of the paint shop and nothing else. The decision may be binding on your Lordships if there is another such paint shop anywhere, but

[42] 13 D.R.A. 64.
[43] 1931 S.C. 416.
[44] 18 R. & I.T. 77.
[45] 13 D.R.A. 64.
[46] [1931] A.C. 151.

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it is not, in my opinion, binding for anything else. If your Lordships were to elevate that particular precedent into a binding decision on the meaning of "maintenance" you would, I believe, carry the doctrine of precedent farther than it has ever been carried before. Just take the steps in the reasoning. It goes like this: The word "maintenance" includes painting in the paint shop. That shows that it goes beyond ordinary maintenance (as I have described it) and include repairs. Hence it is wide enough to include overhauling and reconditioning—and even reassembling into different vehicles. But when it is pointed out that, if that meaning is adopted, it will lead to an absurdity in the statute—that it leaves a gap which Parliament cannot have intended—then it is said you must fill in the gap by writing into the statute words which are not there and by altering other words. At that point in the argument you come face to face, not with a particular precedent on this Act, but with a fundamental principle on all Acts, which is this: The judges have no right to fill in gaps which they suppose to exist in an Act of Parliament, but must leave it to Parliament itself to do so: see *Magor and St. Mellons Rural District Council* v. *Newport Corporation*.[47] No court is entitled to substitute its words for the words of the Act: see *Goodrich* v. *Paisner*.[48]

It seems to me that when a particular precedent—even of your Lordships' House—comes into conflict with a fundamental principle, also of your Lordships' House, then the fundamental principle must prevail. This must at least be true when, on the one hand, the particular precedent leads to absurdity or injustice and, on the other hand, the fundamental principle leads to consistency and fairness. It would, I think, be a great mistake to cling too closely to particular precedent at the expense of fundamental principle. Here every principle of construction requires this House to limit the word "maintenance" to ordinary maintenance and not to extend it to the vast repairs and reconditioning and reassembling done in this depot. It is, to my mind, clearly an industrial hereditament entitled to be derated.

I would therefore allow this appeal.

Solicitors: *M. H. B. Gilmour; Solicitor of Inland Revenue.*

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[47] [1952] A.C. 189; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.

[48] [1957] A.C. 65, 88; [1956] 2 W.L.R. 1053; [1956] 2 All E.R. 176.

[PRIVY COUNCIL.]

ARIADNE TZAMBURAKIS AND ANOTHER . . APPELLANTS;

AND

EFTICHIA RODOUSSAKIS . . . . RESPONDENT.

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July 16.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa (Tanganyika)—Practice and procedure—Limitation—Lease of share of sisal estate—Suit for an account—Preliminary issue of limitation—Suit held not time-barred—Judgment for plaintiff on trial of action—Appeal—Duty of appeal court to deal with issue of limitation—Indian Code of Civil Procedure (V of 1908), ss. 2, 97—Indian Limitation Act (IX of 1908), s. 3; First Schedule, arts. 106, 116.

By section 97 of the Indian Code of Civil Procedure (applied to Tanganyika in 1920 by Order in Council): "Where any party "aggrieved by a preliminary decree . . . does not appeal from "such decree, he shall be precluded from disputing its correctness "in any appeal which may be preferred from the final decree."

The respondent, who was the co-owner as tenant-in-common with her brother of a sisal estate in Tanganyika, worked the estate in partnership with him from 1932 to April 1, 1946, when she granted him a lease of her share and interest for three years from April 1, 1946, on a royalty per ton basis. There followed thereafter a period of three months—the interregnum period—from April 1, 1949, to July 1, 1949, when the pre-lease partnership basis subsisted. The respondent, on July 23, 1952, brought an action against the appellants as administratrices of her brother's estate, claiming that he had failed to account to her for moneys payable by him to her in connexion with the estate during the period April 1, 1946, to July 1, 1949. The appellants' plea that the action was barred by the provisions of the Indian Limitation Act, 1908 (which applied in Tanganyika), was tried as a preliminary issue on the pleadings, and it was held that an amended plaint which had been filed on July 27, 1954, did not disclose a new cause of action, and that the suit was not time-barred under the Act of 1908. The case accordingly proceeded to trial on the merits (before a different judge) and judgment was given for the respondent and an account ordered to be taken.

On appeal to the Court of Appeal for Eastern Africa by the appellants, who challenged in that court, inter alia, the ruling of the judge on the limitation issue, the court were of opinion that the decision on that issue was a preliminary decree within the meaning of sections 2 (2) and 97 of the Code of Civil Procedure and that there having been no appeal entered within time against it the appellants' challenge to it was incompetent:—

Held, first, that the Court of Appeal should have entertained the appeal against the decision of the judge on the limitation issue. The decision in *Chanmalswami* v. *Gangadharappa* (1914) I.L.R. 39 Bom. 339, which overruled *Sidhanath Dhonddev* v. *Ganesh Govind* (1912) I.L.R. 37 Bom. 60, in which it had been held that decisions as to, inter alia, limitation, were preliminary decrees from which the unsuccessful parties must at once appeal

* *Present*: LORD MORTON OF HENRYTON, LORD TUCKER, and the RT. HON. L. M. D. DE SILVA.

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by reason of section 97 of the Code, was to be preferred. A further reason why the Court of Appeal should have dealt with the issue of limitation was that section 3 of the Indian Limitation Act in terms required the dismissal of every suit instituted after the prescribed period of limitation even though this defence was not pleaded.

Muhammad Kamil v. *Musammat Imtiaz Fatima* (1909) 14 C.W.N. 59 considered.

In the present case no procedural defect could relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a judgment given in favour of a plaintiff in respect of a time-barred cause of action.

Held, secondly, that the amended plaint disclosed no new cause of action and time must be calculated from the date of the original plaint, July 23, 1952, and that the main part of the claim, being one which amounted in law for rent under a registered lease, came, following *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (1916) L.R. 44 I.A. 65; I.L.R. 44 Cal.(P.C.) 759, within article 116 of the First Schedule to the Limitation Act, which specified six years as the relevant period, and was not time-barred. The claim in respect of the interregnum period could be dealt with only on the basis of a partnership, and as to that period the claim was time-barred under article 106 of the Act, which provided for a three-year period.

Order of the Court of Appeal for Eastern Africa set aside.

APPEAL (No. 5 of 1957) from a judgment of the Court of Appeal for Eastern Africa (July 18, 1956) affirming a judgment of the High Court of Tanganyika at Dar-el-Salaam (October 17, 1955).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellants in this case were the administratrices of one Nico Tzamburakis, deceased, and the respondent was his sister. The deceased and the respondent were co-owners as tenants-in-common, having shares of 70 per cent. and 30 per cent. respectively, of a large sisal estate in Tanganyika.

The suit was brought in the High Court of Tanganyika by plaint dated July 23, 1952, by the respondent as plaintiff against the estate of the deceased, represented by the present appellants, claiming that the deceased had failed to account to her for moneys payable by him to her in connexion with this estate during the period from April 1, 1946, to July 1, 1949.

The appellants pleaded, inter alia, that the claim was barred by the provisions of the Indian Limitation Act, 1908, which together with the Indian Code of Civil Procedure had been applied to Tanganyika in 1920 by Order in Council. This question was tried as a preliminary issue on the pleadings by Mahon J. who, on December 3, 1954, delivered what was described in the Record as "Judge's Ruling on Preliminary Issues," whereby he held that an amended plaint which had been filed on July 27, 1954, did not disclose a new cause of action and that the suit was not time-barred by the Indian Limitation Act.

The case accordingly proceeded to trial on the merits and was

heard by Cox C.J. who, on October 17, 1955, gave judgment in favour of the respondent and ordered an account to be taken. The terms thereof were embodied in a decree bearing the same date and are set out at pages 42 to 44 of the Record in the present appeal.

It was important to observe that at the trial before the Chief Justice there was no dispute as to the liability of the deceased to account to the respondent. The defence was that he had rendered full and accurate accounts and that the respondent had received all moneys to which she was entitled and that she and the deceased had signed a document on July 14, 1949, confirming the settlement of all accounts up to June 30, 1949, and acknowledging that nothing was then due by either of them to the other. As to this document the judge accepted the respondent's evidence and upheld her plea of non est factum. The judge's decision with regard to this document was not now challenged.

At page 33, paragraph 20, the judge said: "Apart from a "technical defence which another judge of this court dismissed, "the defence to the plaintiff's claim is that she has received "everything due to her from the estate under the lease, and that "she has received full and accurate accounts. I have already "touched on the allegations that the plaintiff had not received "her full share. As regards the accounts, it was proved quite "clearly before me that proper accounts had never been "rendered."

At page 37, paragraph 31, he said: "It will, in my opinion, "probably be an extremely difficult task for accurate accounts "now to be made up because the documents are apparently "either non-existent, carefully hidden or misplaced, but the "fact remains that the plaintiff has not had proper accounts "showing her share to which she was entitled under the lease."

The appellants in their appeal to the Court of Appeal for Eastern Africa challenged the ruling of Mahon J. on the limitation issue and the decision of the Chief Justice as to the respondent's plea of non est factum. Their grounds of appeal also alleged that the judgment was against the weight of evidence. The respondent contended that there was no right of appeal from the ruling of Mahon J. which, it was contended, was a preliminary decree within the meaning of section 97 of the Indian Code of Civil Procedure. Neither party disputed the basis upon which the account had been ordered to be taken if the Limitation Act did not apply. With regard to the transactions and arrangements between the respondent and the deceased in connexion with this sisal estate of which they were tenants-in-common: from 1932 to April 1, 1946, the respondent and the deceased worked the estate in partnership, at one time on a 50 per cent. basis, but the percentage varied from time to time and by 1946 the respondent was the registered owner of 30 per cent. undivided share of the estate. The deceased was the active manager and received a salary as such. There were disputes and differences

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between the parties as to their proper share of the profits and in order to put matters on a more definite basis the parties entered into a lease for three years from April 1, 1946, whereby the respondent, who was described as the landlord, demised to the deceased, who was described as the tenant, as to her share and interests the hereditaments described in the schedule thereto together with the sisal factory, machinery, trollies, railway lines and other chattels and effects then on the estate and forming part of the sisal estate as a running concern and paying therefor during the term a royalty of £3 per ton on all grades of sisal and tow produced from the whole estate, subject to a provision for increase or decrease depending on rises or falls in the price of sisal. The royalty was to be paid within 30 days of the sale of sisal.

On the termination of this lease on March 31, 1949, there followed a period of three months, which had been referred to throughout as the interregnum period. As to this period the trial judge held on the evidence that the respondent was entitled to her share of the estate. At page 36, paragraph 28, he said: "The plaintiff is obviously entitled to her share in the estate "over that period, and it would appear that her share in the "estate over that period would have to be ascertained on the "basis of the relationship existing between her and her brother "prior to entering into this first lease which became effective "from April 1, 1946."

And when dealing with the form of the order he said on p. 39, paragraph 34: "As regards sub-paragraph (2) of paragraph 32 "[referring to an earlier paragraph in his judgment wherein the "plaintiff's prayer had been set out] the answer to that would "appear to be ascertainable on the basis of the partnership which "existed between the brother and sister prior to April 1, 1946, "that is to say, on a 70 per cent. figure and a 30 per cent. figure "basis, but not inclusive of any profits for the month of July, "1949, as the plaintiff had leased her share of the estate to her "brother on July 14, 1949, for Shs. 18,000/– a month with effect "from July 1, 1949, and was paid the rent for the month of "July."

As from July 1, 1949, a second lease was entered into under which all rent had been paid and ultimately in October, 1949, the estate was sold and the proceeds divided between the co-owners. No question arose in this appeal with regard to the second lease or the sale. The dispute was confined to the period of the first lease (April 1, 1946–March 31, 1949) and the interregnum period (April 1, 1949–July 1, 1949).

The leading judgment in the Court of Appeal for Eastern Africa, affirming the judgment of the trial judge, was delivered by Briggs J.A. With this judgment the other members of the court (Worley P. and Sinclair V.-P.) concurred.

The relevant provisions of the Indian Code of Civil Procedure were sections 2 (2), 2 (14), 33, 96 (1), 97 and 105 (1), and of the

Indian Limitation Act, 1908, section 3, and the First Schedule, articles 89, 106, 110, 115, 116 and 120.

The Indian Code of Civil Procedure provided:

" Section 2 (2). ' Decree ' means the formal expression of an " adjudication which, so far as regards the court expressing it, " conclusively determines the rights of the parties with regard to " all or any of the matters in controversy in the suit and may be " either preliminary or final . . ."

" Explanation. A decree is preliminary when further pro- " ceedings have to be taken before the suit can be completely " disposed of. It is final when such adjudication completely dis- " poses of the suit. It may be partly preliminary and partly " final."

" Section 2 (14). ' Order ' means the formal expression of any " decision of a civil court which is not a decree."

" Section 33. The court, after the case has been heard, shall " pronounce judgment, and on such judgment a decree shall " follow."

" Section 96 (1). Save where otherwise expressly provided in " the body of this Code or by any other law for the time being " in force, an appeal shall lie from every decree passed by any " court exercising original jurisdiction to the court authorized " to hear appeals from the decisions of such court."

" Section 97. Where any party aggrieved by a preliminary " decree passed after the commencement of this Code does not " appeal from such decree, he shall be precluded from disputing " its correctness in any appeal which may be preferred from the " final decree."

" Section 105 (1). Save as otherwise expressly provided, no " appeal shall lie from any order made by a court in the exercise " of its original or appellate jurisdiction; but where a decree is " appealed from, any error, defect or irregularity in any order, " affecting the decision of the case, may be set forth as a ground " of objection in the memorandum of appeal."

The Indian Limitation Act, 1908, provided:

" Section 3. Subject to the provisions contained in sections " 4 to 25 (inclusive) every suit instituted, appeal preferred, and " application made after the period of limitation prescribed there- " for by the first Schedule shall be dismissed, although limitation " has not been set out as a defence."

" FIRST SCHEDULE

Description of Suit	*Period of Limitation*	*Time from which period begins to run*
89. By a principal against his agent for movable property received by the latter and not accounted for.	3 years	When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates.

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106. For an account and a share of the profits of a dissolved partnership.	3 years	The date of the dissolution.
110. For arrears of rent.	3 years	When the arrears become due.
115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	3 years	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
116. For compensation for the breach of a contract in writing registered.	6 years	When the period of limitation would begin to run against a suit brought on a similar contract not registered.
120. Suit for which no period of limitation is provided elsewhere in this Schedule.	6 years	When the right to sue accrues."

The Court of Appeal held that there having been no appeal entered within time from the decision of Mahon J. which, in their view, was a preliminary decree within the meaning of sections 2 (2) and 97 of the Code of Civil Procedure, the grounds of appeal seeking to attack his decision were incompetent.

1958. June 3, 4, 9. *Sir Frank Soskice Q.C.* and *Mark Littman* for the appellants.

The respondent did not appear and was not represented and did not deliver a written case.

In addition to the cases referred to in the judgment the following were cited in argument: *Ashgar Ali Khan* v. *Khurshed Ali Khan* [1]; *Chandra Madhab Barua* v. *Nobin Chandra Barua* [2]; *Charan Das* v. *Amir Khan* [3]; *Dipple* v. *Dipple* [4]; *Daniel* v. *Gracie* [5]; *Treseder-Griffin* v. *Co-operative Insurance Society Ltd.* [6]; *Farewell* v. *Dickenson* [7]; *Nobocoomar Mookhopadhaya* v. *Siru Mullick* [8]; *Husain Ali Khan* v. *Hafiz Ali Khan* [9]; *Ganesh Krishn* v. *Madhavrav Ravji* [10]; *Kesu Shivram* v. *Vithu Kanaji* [11]; *Naresh Mohan* v. *Brij Mohan* [12]; *Hussain Bakhsh* v. *Secretary of State* [13];

[1] (1901) L.R. 28 I.A. 227; I.L.R. 24 All. (P.C.) 27.
[2] (1912) I.L.R. 40 Cal. 108.
[3] (1920) I.L.R. 48 Cal. 110.
[4] [1942] P. 65.
[5] (1844) 6 Q.B. 145.
[6] [1956] 2 Q.B. 127; [1955] 3 W.L.R. 996; [1955] 3 All E.R. 793.
[7] (1827) 6 B. & C. 251.
[8] (1880) I.L.R. 6 Cal. 94.
[9] (1881) I.L.R. 3 All. 600.
[10] (1881) I.L.R. 6 Bom.. 75.
[11] (1884) I.L.R. 9 Bom. 320.
[12] (1933) A.I.R.(P.C.) 43.
[13] (1935) A.I.R.(Lah.) 982.

Ahmed Musaji Saleji v. *Hashim Ebrahim Saleji* [14]; *In re J. B. Palmer's Application* [15]; *Salaman* v. *Warner* [16]; *In re Herbert Reeves & Co.* [17]; *Bozson* v. *Altrincham U. D. C.* [18]; *Egerton* v. *Shirley* [19]; *Hunt* v. *Allied Bakeries Ltd.* [20]; *Bai Divali* v. *Shah Vishnav Manordas* [21]; *Sakharam Vishram* v. *Sadashiv Balshet* [22]; *Vamanacharya* v. *Govind* [23]; *Irrani* v. *Naimuddin* [24]; *Barkat Ram* v. *Bhagwan Singh* [25]; *Zamindar of Bodinaickanur* v. *Kamarajapandia Naicker*.[26]

July 16. The judgment of their Lordships was delivered by Lord Tucker, who stated the facts and statutory provisions set out above and continued: If the respondent is entitled to an account for the interregnum period and if her claim is not barred by the Limitation Act the basis upon which the Chief Justice ordered the account to be taken has never been challenged by either party and their Lordships see no reason for rejecting the decision of the judge that the proper basis was that of a partnership subsisting from April 1, 1949 to July 1, 1949.

As to the first lease, which was registered, their Lordships feel no doubt that the sum payable thereunder, although called a royalty and calculated on a royalty basis, was a sum which was at all times readily and easily ascertainable by calculation and amounted in law to a rent. The Court of Appeal so treated it.

The questions therefore now remaining to be dealt with are three in number: 1. Was the Court of Appeal entitled to entertain an appeal against the decision of Mahon J. on the Limitation Act issue? 2. If so, what is the proper period of limitation applicable to (*a*) the claim for an account of rent payable under the registered lease dated March 26, 1946, for the period April 1, 1946, to March 31, 1949; and (*b*) the claim for an account of the respondent's share of profits on a partnership basis for the period April 1, 1949, to July 1, 1949?

Their Lordships do not agree with the decision of the Court of Appeal that the grounds of appeal seeking to attack Mahon J.'s decision on the limitation issue were incompetent. They prefer the decision of the Full Bench Court in Bombay in the case of *Chanmalswami* v. *Gangadharappa*,[1] which overruled the case of *Sidhanath Dhonddev* v. *Ganesh Govind* [2] in which it had been held that decisions as to misjoinder, limitation and jurisdiction were preliminary decrees from which the unsuccessful parties must at once appeal by reason of section 97 of the Code.

There is, however, another reason why their Lordships are of

[14] (1915) L.R. 42 I.A. 91; I.L.R. 42 Cal.(P.C.) 914.
[15] (1882) 22 Ch.D. 88.
[16] [1891] 1 Q.B. 734; 7 T.L.R. 484.
[17] [1902] 1 Ch. 29.
[18] [1903] 1 K.B. 547; 19 T.L.R. 266.
[19] [1945] K.B. 107; [1944] 2 All E.R. 583.
[20] [1956] 1 W.L.R. 1326; [1956] 2 All E.R. 513.
[21] (1909) I.L.R. 34 Bom. 182.
[22] (1913) I.L.R. 37 Bom. 480.
[23] (1923) 25 Bom.L.Rptr. 826.
[24] (1923) 39 Cal.L.J. 251.
[25] (1949) A.I.R.(E.Punj.) 222.
[26] (1933) 64 Mad.L.J. 735.
[1] (1914) I.L.R. 39 Bom. 339.
[2] (1912) I.L.R. 37 Bom. 60.

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opinion that the Court of Appeal should have dealt with the issue of limitation, viz., that section 3 of the Indian Limitation Act, 1908, in terms requires the dismissal of every suit instituted after the prescribed period of limitation even though this defence is not pleaded.

In the case of *Muhummad Kamil* v. *Musammat Imtiaz Fatima* [3] on appeal to this Board, where a plea under section 4 of the Limitation Act, 1877 (which corresponds with section 3 of the Act of 1908) had been abandoned by counsel at one stage in the courts below, Lord Macnaghten observed [4] during the course of argument "the abandonment would not relieve the court from "taking notice of it," and the Board in its judgment said: "As "to this question of limitation, their Lordships are of opinion that "it was properly dealt with in the courts below."

In the present case their Lordships are of opinion that no procedural defect could relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a judgment given in favour of a plaintiff in respect of a time-barred cause of action.

It is necessary, therefore, to consider whether on the basis upon which judgment was entered for the respondent at the trial her claim was in whole or in part time-barred.

It was contended by the appellants that the amended plaint disclosed a new cause of action and that for the purposes of the Limitation Act time should be calculated from this date, i.e., July 27, 1954. Their Lordships, having compared the original plaint with the amendment, are satisfied that the latter discloses no new cause of action, but in any event, the amendment having been made by consent and approved by the court without the imposition of any condition with regard to limitation, it follows that time must be calculated from the date of the original plaint, i.e., July 23, 1952.

As regards the claim for rent, the relevant period of limitation depends on whether the claim for payment under this lease, which was a contract in writing registered, falls within article 116 of the first schedule, under which the period is six years, or article 110, under which it is three years.

This question was settled by a Board of the Judicial Committee consisting of Lord Parker of Waddington, Lord Sumner, Sir John Edge and Sir Lawrence Jenkins in 1916 in the case of *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*.[5] In a judgment delivered by Lord Sumner it was held that a claim for rent under a registered lease came within article 116. In view of the unqualified words "arrears of rent" in article 110 and the use of the word "compenstion" in article 116 it is perhaps desirable to set out at some length the passage in the judgment dealing with this matter.

After referring to the history of the limitation legislation

[3] (1909) 14 C.W.N. 59.
[4] Ibid. 63.
[5] (1915) L.R. 44 I.A. 65; I.L.R. 44 Cal.(P.C.) 759.

culminating in the Acts of 1871 and 1877 the judgment proceeded [6]: "Both these Acts draw, as the Act of 1859 had drawn, "a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question "eventually arose whether a suit for rent on a registered contract "in writing came under the longer or the shorter period. On one "hand it has been contended that the provision as to rent is plain "and unambiguous and ought to be applied, and that in any case "'compensation for the breach of a contract' points rather to a "claim for unliquidated damages than to a claim for payment "of a sum certain. On the other [hand] it has been pointed out "that 'compensation' is used in the Indian Contract Act in "a very wide sense, and that the omission from article 116 of "the words, which occur in article 115, 'and not herein specially "'provided for' is critical. Article 116 is such a special pro"vision, and is not limited, and therefore, especially in view of "the distinction long established by these Acts in favour of regis"tered instruments, it must prevail. There is a series of Indian "decisions on the point, several of them in suits for rent, though "most of them are in suits on bonds. They begin in 1880, and "are to be found in all the Indian High Courts. In spite of some "doubts once only was it held, in 1903 [*Ram Narain* v. *Kamta* "*Singh* [7]], that in such a suit article 110 and not article 116 "applied. Then in 1908, and in this state of the decisions, Act "IX of 1908 replaced the Limitation Act of 1877 without altering "the language or arrangement of the articles, and in 1913 in "*Lalchand* v. *Narayan* [8] the High Court of Bombay held that, "especially in view of this re-enactment, the current of decisions "must be followed, and *Ram Narain's* case [9] must be disapproved. "In the present case the High Court treated the matter as settled "law in the same sense. . . .

"However arguable the construction of Act XV of 1877 may "have been when the matter was one of first impression, it "certainly cannot be said that the construction, for which the "appellant argues, was ever clearly right. On the contrary, their "Lordships accept the interpretation so often and so long put "upon the statute by the courts in India, and think that the "decisions cannot now be disturbed."

This decision was given in 1916, three years before the Indian Limitation Act was applied to Tanganyika. It was binding on the Indian Courts and settled once and for all a matter with regard to which there had been some conflict of opinion. Their Lordships do not consider it would be proper at this date to refuse to follow a decision of this Board given in such circumstances, which must have been recognized as valid and binding when the Indian Limitation Act, 1908, was made applicable to Tanganyika.

They accordingly hold that article 116 is applicable to the

[6] L.R. 44 I.A. 69.
[7] (1903) I.L.R. 26 All. 138.
[8] (1913) I.L.R. 37 Bom. 656.
[9] I.L.R. 26 All. 138.

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claim under the lease and that the relevant period of limitation is six years. Counsel for the appellants drew their Lordships' attention to the fact that the decree of October 17, 1955, ordered an account to be taken of all sisal produced during the period covered by the first lease, namely, from April 1, 1946, to March 31, 1949, and of the rent by way of royalty due to the respondent on such total production whereas the period of six years calculated from July 23, 1952, would go back to July 23, 1946, and any money payable between April 1, 1946, and July 23, 1946, would be time-barred. Their Lordships are of opinion that the taking of an account covering the whole period of the lease was properly ordered, but they would point out that after the account has been taken the appellants should not be ordered to pay any sums received by the deceased in respect of sales of sisal made more than 30 days prior to July 23, 1946, or any sums received by him on sales of machinery or other movables before that date.

With regard to the claim in respect of the interregnum period (April 1, 1949, to July 1, 1949) their Lordships have already signified their acceptance of the basis upon which the account was ordered by the Chief Justice. That basis has never been challenged by the respondent and the appellants are entitled to say that it is the only basis upon which this part of the claim can be dealt with. It follows, therefore, that as to this period the claim is time-barred under section 106 of the Indian Limitation Act, 1908, and the appellants are entitled to the necessary consequential amendment of the decree drawn up pursuant to the judgment of the Chief Justice.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be allowed to the extent that the order of the Court of Appeal for Eastern Africa dated July 18, 1956, be set aside and the decree of the High Court of Tanganyika dated October 17, 1955, be varied by striking out paragraph (2) thereof. The appellants, although successful only with regard to a small part of the period covered by the claim, have had to appeal to the Court of Appeal for Eastern Africa and thence to this Board in order to secure the appropriate variation of the order made against them and are consequently entitled to some measure of relief in respect of costs, which in all the circumstances their Lordships consider will be met by ordering that the respondent do pay one quarter of the appellants' costs in the Court of Appeal for Eastern Africa and of this Appeal.

Solicitors: *Theodore Goddard & Co.*

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[COURT OF APPEAL.]

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May 16, 19, 20, 21; *June* 23.

[1956 B. 1596.]

Jenkins, Parker and Pearce L.JJ.

Highway — Non-feasance of local authority — New road — Statutory vesting in local authority—Accident caused by projecting kerb of island adjacent to roundabout—Negligence—Highway constructed by county council and subsequently vesting in local authority—Liability of local authority in claim for damages—Development and Road Improvement Funds Act, 1909 (9 *Edw.* 7, *c.* 47), *s.* 10 *—Local Government Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 17), *s.* 32.

The plaintiff's husband was killed when a motor-cycle which he was riding at night on a highway collided with the kerb of an approach island adjacent to a roundabout. In her action for damages in respect of the death of her husband against the defendants, as the authority responsible for the highway in question at the date of the accident, the plaintiff claimed, in effect, that the accident was brought about by the negligence of the defendants as highway authority, in that the approach island was so shaped and sited that a part of it projected into the carriageway along which the deceased was riding, but that the defendants nevertheless failed to light it or to give users of the highway warning (by means of traffic signs or otherwise) of the existence of the projection, and that this amounted to a concealed danger or trap.

The highway was constructed between 1938 and 1940 by the Durham County Council under sections 8 and 10 of the Development and Road Improvement Funds Act, 1909,[1] and was taken over by

[1] Development and Road Improvement Funds Act, 1909 (as amended by the Roads Act, 1920), s. 8: "*Powers of Minister of Transport.* "(1) The Minister of Transport shall "have power, with the approval of the "Treasury—(*a*) to make to any high- "way authority advances in respect of "the construction of new roads or the "maintenance or improvement of "existing roads, or to make such "advances, in conjunction with a "highway authority, to any company "or person."

S. 10: "(1) Where the Minister "of Transport makes an advance to a "highway authority in respect of the "construction of a new road, the "Minister may authorize the autho- "rity to construct the road, and "where so authorized the highway "authority shall have power to con- "struct the road and to do all such "acts as may be necessary for the "purpose, and any expenses of the "authority, so far as not defrayed out "of the advance, shall be defrayed as "expenses incurred by the authority "in exercise of their powers as high- "way authority, and the enactments "relating to such expenses, including "the provisions as to borrowing, shall "apply accordingly. (2) Where the "highway authority to whom the "advance is made are a county coun- "cil, the new road, when constructed, "shall be a main road and in "any other case shall be a highway "repairable by the inhabitants at "large: Provided that the main- "tenance of any such road within the "administrative County of London "shall devolve upon the local autho- "rity responsible for the maintenance "of streets and roads in whose district "the same is situate."

Local Government Act, 1929, s. 29: "(1) The council of every county shall "be the highway authority as respects "every road in the county which at "the appointed day [April 1, 1930] is "a main road, or which would, apart "from this section, at any time there- "after have become a main road, and "every such road . . . shall be termed "a county road, and all enactments "relating to main roads shall as from "the appointed day have effect as if

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the defendants in 1941 under section 32 of the Local Government Act, 1929, complete with roundabout, islands, lights and traffic signs; and it had remained unaltered since that date.

Held, that on the assumption that the defendants were in any way at fault in respect of the approach island, that fault consisted exclusively of non-feasance; that, accordingly, if the defendants were to be held liable it could only be by virtue of some express words in the Act under which the road became vested in them; but that there was nothing in section 32 of the Local Government Act, 1929, to impose on an urban district council taking over a county road any special obligation as to the maintenance of the road so as to exclude the ordinary immunity from civil action in respect of mere non-feasance, and that, therefore, the plaintiff's action must necessarily fail.

Cowley v. *Newmarket Local Board* [1892] A.C. 345; 8 T.L.R. 788 applied.

Fisher v. *Ruislip-Northwood Urban District Council and Middlesex County Council* [1945] K.B. 584; 62 T.L.R. 1; [1945] 2 All E.R. 458 and *Nash* v. *Rochford Rural Council* [1917] 1 K.B. 384 considered.

Per curiam: When a highway authority constructs out of public funds a new road for the use of the public under the statutory powers delegated to the authority by the Minister under section 10 of the Development and Road Improvement Funds Act, 1909, and opens it to the public on completion, there is no question of the dedication of the road to the public by the constructing highway authority and the immunity afforded to a private owner of land who dedicates it as a public highway has no application to such a case. On the contrary, a highway authority constructing a road for the use of the public under statutory powers is under a positive duty to take reasonable care to construct it properly. But it does not follow therefrom that the exemption from liability in damages for mere non-feasance does not extend to the highway authority for the time being responsible for its maintenance. The exemption undoubtedly applies to all highway authorities made responsible by statute for the maintenance of any roads as successors to the surveyors of highways, unless it is excluded by the terms of some special enactment.

Decision of Barry J. reversed.

APPEAL from Barry J. sitting at Durham Assizes.

The facts are taken from the judgment of the court.

This was an appeal by the Stockton-on-Tees Corporation from

" for references therein to main roads " there were substituted references to " county roads."

S. 32: " *Rights of certain urban " district councils to maintain county " roads.* (1) Where an urban district " has a population exceeding twenty " thousand, the urban district council " may claim to exercise the functions " of maintenance and repair of any " county road within their district, " and if a claim is made within the " time hereinafter limited, then, as " from such date as is hereinafter " mentioned, the urban district council " shall be entitled to exercise those " functions, and the road shall vest in " that council, and for the purpose of " the maintenance, repair and improvement of, and other dealing " with, any such road, that council " shall have the same functions as if " they were as respects that road the " highway authority and the road " were an ordinary road vested in " them. (2) Such claim as aforesaid " must be made— . . . (*c*) in the case " of any road which becomes a county " road after the appointed day, or " after the date mentioned in any of " the last three foregoing paragraphs, " as the case may require, within " twelve months after the date when " it so becomes a county road."

a judgment of Barry J. dated November 4, 1957, whereby he awarded the plaintiff, Eileen Elizabeth Baxter, a total of £4,500 damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants as the highway authority responsible for the highway known as Fleet Bridge Road in the County of Durham, in respect of the death of her husband, Alexander Ralph Baxter, from injuries sustained by him when a motor-cycle on which he was riding at night along Fleet Bridge Road came into collision with the kerb of an approach island adjacent to the Portrack Roundabout. The basis of the claim was (in effect) that the accident was brought about by the negligence of the defendants as highway authority, in that the approach island was so shaped and sited that the part of it with which the motor-cycle collided projected into the carriageway along which the deceased was riding, but the defendants nevertheless failed to light the island or the part of it so projecting, or to give users of the highway (including the deceased) warning (by means of traffic signs or otherwise) of the existence of the projection, which amounted to a concealed danger or trap.

The accident took place at about midnight on October 14/15, 1955, when the plaintiff's husband, a company quartermaster sergeant in the Royal Army Service Corps, and a highly skilled motor-cyclist, was riding his motor-cycle eastwards along the Fleet Bridge Road on his way from Norton, near Billingham, to Middlesbrough. In order to reach Middlesbrough he had to negotiate the Portrack Roundabout, situated at the point where the Haverton Hill Road is intersected by the Fleet Bridge Road and its continuation towards Middlesbrough known as the Tees (Newport) Bridge Approach Road, which takes off from the roundabout nearly opposite the point at which the Fleet Bridge Road enters it.

Where it approaches the roundabout the Fleet Bridge Road is laid out as a dual carriageway by means of a central strip of grass edged with concrete kerbing, the northern carriageway being reserved for eastbound, and the southern for westbound, traffic. At the point of junction of the Fleet Bridge Road with the roundabout the central strip ends on the western side of an accommodation road joining the two carriageways, and immediately beyond that comes the relevant approach island. This was a plot of grass in the shape of an irregular quadrilateral bordered by concrete kerbing some 4 inches high, its western and shortest side forming the eastern side of the accommodation road, its southern side in line with the kerbing on the south side of the central strip, its eastern side facing the central island of the roundabout and its northern side (the one with which the motor-cycle collided) slanting or splayed outwards (or to the left from the point of view of eastbound traffic) from the line of the northern kerb of the central strip at a fairly pronounced angle. This slant or splay, though to a great extent compensated by a

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more gradual curve of the opposite side of the northern carriageway in the same direction, would give the effect to a person driving along the middle or right-hand side of the northern carriageway of a sudden turning of the off-side kerb diagonally across his front. Shortly before it reaches the approach island the northern carriageway makes a very slight turn to the right.

As regards lighting and traffic signs at the time of the accident, there was a number of street lamps illuminated by gas disposed about the outer perimeter of the roundabout but these were operated on the half-night system, which means that they were automatically turned off at 11 p.m. On the perimeter of the central island of the roundabout there were four illuminated keep-left bollards, one facing down the northern carriageway of Fleet Bridge Road, one down the southern (or incoming) carriageway of Tees (Newport) Bridge Approach Road (which was also laid out as a dual carriageway), and one down each of the two sections of the intersected Haverton Hill Road (which were not dual carriageways). These four bollards were accompanied by reflecting arrows pointing to the left. There was also an illuminated keep-left bollard on each of the approach islands. In the case of Fleet Bridge Road the bollard on the approach island faced diagonally to the right from the point of view of eastbound traffic, for the purpose of guiding westbound traffic into the southern carriageway, and could not be seen by anyone travelling east. The bollard on the approach island, in the case of the other dual carriageway, was similarly faced from the point of view of westbound traffic to guide eastbound traffic into its proper path. The shape and positioning of this approach island was very much the same as in the case of Fleet Bridge Road, but the leftward slant or splay was perhaps somewhat less pronounced. The two sections of Haverton Hill Road, not being dual carriageways, were each provided with a central approach island on which was mounted an illuminated keep-left bollard facing down the road by way of warning to incoming traffic. The dual carriageway in the case of the Tees (Newport) Bridge Approach Road appears to have begun only a short distance from the roundabout, and its beginning was marked by another illuminated keep-left bollard facing down the road. Each of the four roads had on its near side coming in towards the roundabout an advance direction sign with reflector studs. In the case of Fleet Bridge Road, however, this sign was sited some 20 feet to the left of the carriageway.

There were some red lamps placed round the central island to warn of certain work in progress, but there was a doubt whether these were alight at the material time and it was agreed that they should be disregarded for the purposes of this case.

The deceased was accompanied on his abortive trip to Middlesbrough by a friend, Sergeant Stockdale, also of the R.A.S.C. They had met at a dance at Norton, and agreed to go on to some other attraction in Middlesbrough. The deceased led

the way on his motor-cycle, Sergeant Stockdale following in a small car. The deceased's headlight was burning brightly, though apparently there was some question as to the condition of his dynamo. They set off, with the deceased leading at perhaps 35 miles per hour. Sergeant Stockdale lost sight of the deceased before they reached the roundabout (which was only about a mile from the hall where the dance was held) but attributed this to the fact that he slowed down because the road surface was bumpy. There was some degree of mist over the roundabout, which Sergeant Stockdale attributed to the I.C.I. works nearby. Sergeant Stockdale went on to Middlesbrough without seeing the deceased again, and waited for him there in vain.

A police constable on his way home from duty soon after midnight found the deceased lying on the central island of the roundabout near the keep-left bollard facing down Fleet Bridge Road, seriously injured, with his machine lying on the same island some 15 feet away. The deceased shortly afterwards died.

Another police constable who came on the scene a little later made a sketch plan based on his inspection of the area. This showed marks on the projecting kerbs and on the ring-road of the roundabout indicating that the motor-cycle struck the kerb much where one would expect it to strike if the deceased had been driving straight along the middle of the northern carriageway, and had continued in that line without observing the slant or splay of the approach island towards his left; and that the impact was such that the motor-cycle jumped the island, landing in the ring-road, and then bouncing or running on out of control to the place at which it was found on the central island, throwing the deceased at some stage in its course to the point where he was found near the keep-left bollard.

The Fleet Bridge Road was constructed between 1938 and 1940 by the Durham County Council under sections 8 and 10 of the Development and Road Improvement Funds Act, 1909. The construction of this new road was projected in 1933, but apparently no funds for the purpose were available at that time. The plans were re-submitted by the Durham County Council to the Ministry of Transport in 1936 and approved by the Minister in 1937 when a 74 per cent. grant was authorized. Work on the road was begun towards the end of 1938 and it was finished in 1940. It was not in dispute that the completed road (including the roundabout) was in conformity with the approved plans, and it was not disputed that the gas lamps, keep-left bollards, reflecting arrows, and advance direction signs were installed in the positions in which they stood at the time of the accident. The defendants took over the Fleet Bridge Road from the county council in 1941 under section 32 of the Local Government Act, 1929.

The county council were in the first instance joined as defendants, but proceedings were later discontinued against them, no doubt because it had become clear that by reason of its transfer

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to the borough council the county council had long since ceased to be in any way responsible for the road.

From the time when they took over the road until the time of the accident to the deceased the defendants did not make any alterations to the roundabout or its approaches or the lights and traffic signs. They simply took over the road, roundabout, islands, lights, traffic signs, and all, from the Durham County Council and left them as they were, though no doubt doing what was necessary in the way of maintenance.

The road, which carried considerable traffic, was, so far as was known, used without accident from its completion in 1940 down to August 9, 1954, a matter of fourteen years. On the latter date there was an accident in which a motor-cyclist collided with the same approach island, and there was another accident on May 19, 1955, in which something similar happened to a car. One of the police witnesses gave evidence about these two accidents from the police records but no details were forthcoming as to the circumstances in which they took place.

Phineas Quass Q.C., *R. Withers Payne* and *R. A. R. Stroyan* for the corporation.

G. S. Waller Q.C. and *C. P. Heptonstall* for the plaintiff.

The following cases, not referred to in the judgment, were cited in argument: *Lanarkshire (Lower Ward) Road Trustees* v. *Kelvinside Estate Trustees* [2]; *Quinn* v. *Ministry of Commerce and Armagh County Council* [3]; *Sheppard* v. *Glossop Corporation* [4]; *Skilton* v. *Epsom and Ewell Urban District Council* [5]; *Evans* v. *Cross* [6]; *R.* v. *Lyon* [7]; *Fisher* v. *Prowse* [8]; *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese Ltd.* [9]; *Attorney-General (at the relation of Ormerod Taylor & Son Ltd.) and Ormerod Taylor & Son Ltd.* v. *Todmorden Borough Council* [10]; *Saunders* v. *Holborn District Board of Works.* [11]

Cur. adv. vult.

June 23, 1958. JENKINS L.J., delivering the judgment of the court, stated the facts and continued: In these circumstances, it would appear to us that prima facie if the defendants were at fault at all in the matter of the approach island with which the deceased's motor-cycle collided, their fault consisted exclusively in non-feasance with no element of misfeasance whatever.

The judge found it possible to hold the defendants liable. On the facts, he formed an extremely serious view of the danger

[2] (1886) 14 R. (Sess.Cas.) (H.L.) 18.
[3] [1954] N.I. 131.
[4] [1921] 3 K.B. 132; 37 T.L.R. 604.
[5] [1937] 1 K.B. 112; 52 T.L.R. 494; [1936] 2 All E.R. 50.
[6] [1938] 1 K.B. 694; 54 T.L.R. 354; [1938] 1 All E.R. 751.
[7] (1825) 5 Dow. & Ry. (K.B.) 497.
[8] (1862) 2 B. & S. 770.
[9] [1953] Ch. 149, 188; [1953] 2 W.L.R. 58; [1953] 1 All E.R. 179.
[10] [1937] 4 All E.R. 588.
[11] [1895] 1 Q.B. 64; 11 T.L.R. 5.

constituted during the hours of darkness by the projecting part of the approach island, with the arrangements in regard to lights and direction signs as they were at the time of the accident. Accepting to the full the various criticisms of it put forward on the plaintiff's side he described it as a dangerous trap. In fairness to the county council and the defendants we feel obliged to say that we think the judge took a somewhat exaggerated view of the danger. A person travelling the way the deceased was going would have to guide him (apart from the gas lamps up to 11 p.m.) the reflecting advance direction sign on his left, the illuminated keep-left sign and reflecting arrow to his front, and the light-coloured concrete kerb on his right. We should have thought that the driver of a car or motor-cycle with moderately good headlights or headlight and not travelling at excessive speed might reasonably be expected to pick up these indications unless the weather conditions were exceptionally bad. It was said that the advance direction sign was too far out to the left, and that a driver would not notice the keep-left bollard and arrow until he had made his turn to the left. It was also said that the very slight curve to the right before reaching the approach island added to the danger. We are not altogether convinced by these criticisms, and are impressed by the apparent record of fourteen years without accident, the effect of which is not to our minds displaced by the bare fact of two accidents, one in 1954 and the other in 1955, with no information as to the circumstances in which they took place. Be that as it may, the judge, having found this to be a dangerous trap, went on to consider the question of liability. He began by rejecting (as we think, rightly) an argument raised by the defendants to the effect that when Fleet Bridge Road was completed and opened to the public the county council had dedicated the road as a public highway with the like legal consequences as attend the dedication of land as a public highway by a private owner. If this were right, then the consequences would ensue that the county council as dedicators of the road must be taken to have made it over to the public such as it was and subject to all hazards and inconveniences existing upon it at the time of dedication, and that neither they nor the defendants as their successors in the office of highway authority could be held liable for any damage arising from the approach island complained of, or under any obligation to obviate or mitigate that danger by lighting or traffic signs or other warning devices. We think it is plain that when a highway authority constructs out of public funds a new road for the use of the public under statutory powers delegated to the authority by the Minister pursuant to section 10 of the Act of 1909, and opens it to the public on completion, there is no question of the dedication of the road to the public by the constructing highway authority in any relevant sense of that expression. The highway authority in such a case constructs in exercise of the delegated statutory powers a road which, constructed as it is under those powers, cannot from first to last be

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anything else than a public highway, and comes into being as such. The immunity afforded to a private owner of land who dedicates it as a public highway in our view has no application to such a case. On the contrary, there is authority, to which we will later refer, for the proposition that a highway authority constructing a road for the use of the public under statutory powers is under a positive duty to take reasonable care to construct it properly.

But it does not follow that because a public highway originated as a new construction under statutory powers, as opposed to originating from dedication by some private owner, therefore the exemption from liability in damages for mere non-feasance does not extend to the highway authority for the time being responsible for its maintenance. In the case of a new road constructed by a highway authority the constructing authority may, as already mentioned, be under a special duty to construct it properly, but apart from that the origin of the road appears to us to be in itself irrelevant to the application of the exemption in respect of mere non-feasance; and if the judge regarded the exemption as excluded by the circumstances of the present case, as at one point in his judgment he appears to suggest, we cannot agree with him. The exemption, as we think, undoubtedly applies to all highway authorities made responsible by statute for the maintenance of any roads as successors to the surveyors of highways unless it is excluded by the terms of some special enactment, which is not the case here. The general principle is thus stated by Lord Halsbury L.C. in *Cowley* v. *Newmarket Local Board*[1]: "The facts were," says Lord Halsbury, "that the defendants are the Newmarket "Local Board of Health, and the footway and the highway "referred to were within the limits and under the care and "management of the defendants as such local board of health; "and the question appears to resolve itself into whether the "public authorities in whom the highways are vested by the "statute can be held liable in an action for any defect in the "repair. I think in this case the liability would have to be put "upon the ground that there was default in the construction "of the highways through which an accident happened to a "passenger. The wide consequences of the existence of such a "right of action would be very serious. As long ago as 1788 a "question of an analogous character was raised in the Court of "King's Bench; and the argument then as now, was that where "one person receives an injury by reason of any other person or "persons omitting to do that which by law he or they are bound "to do, he may maintain an action in the circumstances to recover "satisfaction for the damage he has received in consequence of "that omission. In that case it was said (which seems to me to "be decisive of this case) that the principle which decides against "this kind of action is accurately stated in Brooke's Abridgment, "tit. Action on the Case, pl. 93, where it is said that 'if an

[1] [1892] A.C. 345, 349, 350; 8 T.L.R. 788.

" ' highway be out of repair by which my horse is mired no action " ' lies, " car est populus et surra reforme per presentment," " ' which must be understood to mean that as the road ought to " ' be repaired by the public no individual can maintain an action " ' against them for any injury arising from their neglect ': " *Russell* v. *The Men of Devon.*" [2]

In *Municipal Council of Sydney* v. *Bourke*,[3] the principle was applied to roads constructed in Sydney, New South Wales, under certain local enactments. Lord Herschell L.C., delivering the judgment of the Judicial Committee, said [4]: " It is admitted " that the highway on which the disaster occurred was constructed " by the appellants in the first instance quite properly. No " complaint of misfeasance is made against them. The sole " charge is one of non-feasance: that when the road had fallen " into a bad condition, they failed to execute the necessary repairs. " If, then, they are liable in the present action, it must be either " because that liability has been expressly imposed by some " enactment, or because the Legislature has imposed some duty " upon them for the breach of which a right of action accrues to " any person injured by it."

He also said [5]: " In the series of cases ending with *Cowley* v. " *Newmarket Local Board*,[6] in which it has been held that an " action would not lie for non-repair of a highway, the duty to " repair was unquestionable, and it was equally clear that those " guilty of a breach of this duty rendered themselves liable to " penal proceedings by indictment or otherwise; the only question " in controversy was whether an action could be maintained. The " ground upon which it was held that it could not—even where " the duty of keeping the roads in repair had been in express terms " imposed by statute on a corporate body—was, that it had long " been settled that though a duty to repair rested on the inhabi- " tants, subjecting them to indictment in case of its breach, they " could not be sued, and that there was nothing to show that the " Legislature in transferring the duty to a corporate body had " intended to change the nature or extent of their liability."

Not to multiply citations unduly we will only add on this part of the case the following passages from the judgment of this court delivered by Finlay L.J. in *Swain* v. *Southern Railway Co.*,[7] where it was sought to extend the exemption in respect of mere non-feasance to the road on and approaches to a bridge for which the defendant railway company was responsible. Finlay L.J. said [8]: " We may refer, as Humphreys J. in the court below " referred, to *Municipality of Pictou* v. *Geldert* [9] where the law " is thus summarized by Lord Hobhouse delivering the opinion of " the Board [10]: ' The latest English case is that of *Cowley* v.

[2] (1788) 2 T.R. 667.
[3] [1895] A.C. 433, 435.
[4] Ibid. 435.
[5] Ibid. 443.
[6] [1892] A.C. 345; 8 T.L.R. 788.
[7] [1939] 2 K.B. 560; 55 T.L.R. 805; [1939] 2 All E.R. 794.
[8] Ibid. 573.
[9] [1893] A.C. 524.
[10] Ibid. 527.

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" ' *Newmarket Local Board*,[11] decided in the House of Lords. " ' It must be now taken as settled law that a transfer to a public " ' corporation of the obligation to repair does not of itself render " ' such corporation liable to action in respect of mere non- " ' feasance. In order to establish such liability it must be shown " ' that the Legislature has used language indicating an intention " ' that this liability shall be imposed.' "

Then Finlay L.J. said[12]: " It is, in our opinion, plain that " the principle applicable originally to the inhabitants and appli- " cable now to any public authority which may stand in the shoes " of the inhabitants, has no application to a case such as the " present, where a company, carrying on its business for profit, " as one of the terms upon which it is given power to make its " line, comes under an obligation with reference to bridges and " the approaches thereto."

Later on,[13] Finlay L.J. made this reference to the judgment of Palles C.B. in the Court of King's Bench in Ireland in *Dublin United Tramways Co.* v. *Fitzgerald*[14]: " In that judgment, after " quoting the principle stated in Brooke's Abridgment, and after " referring to the principle established by *Russell* v. *Men of* " *Devon*[15] and *Cowley* v. *Newmarket Local Board*,[16] he said " this—we quote from the Appendix to the House of Lords Book— " ' This principle, however, has never been applied to a trading " ' corporation such as the present, and the principle upon which " ' its extension has hitherto proceeded prevents it from being " ' ever so applied. That principle rests upon the fact that in the " ' matters complained of the exempted corporation represents " ' the citizens and that for the discharge of the duties entrusted " ' to them they are responsible to those whom they represent, " ' and that if they fail to use their powers, well, they can be " ' displaced at the next election. Bodies of this description in " ' principle answer the description of the " populus " mentioned " ' by Brooke. This principle can have no application to the " ' present case in which the defendants are a private trading " ' company.' "

After discussing and rejecting the argument for the defendants based on dedication, Barry J. went on to state what we take to be his essential ratio decidendi in these terms: " Here, " the county council made the road, and they themselves created " the source of danger of which complaint is made. It is not " suggested, of course, that this approach island was a nuisance. " The county council no doubt had power to erect islands, " bollards and other obstructions as had the county council in " *Fisher* v. *Ruislip-Northwood Urban District Council and* " *Middlesex County Council*.[17] This case, however, clearly " establishes that the local authority must itself use reasonable

[11] [1892] A.C. 345.
[12] [1939] 2 K.B. 560, 575.
[13] Ibid.
[14] [1903] A.C. 99.
[15] 2 T.R. 667.
[16] [1892] A.C. 345.
[17] [1945] K.B. 584; 62 T.L.R. 1; [1945] 2 All E.R. 458.

" care to give warning against obstructions however lawfully " those obstructions may have been erected provided their erec- " tion was the act of the authority itself. I would also refer to " the other cases relating to bollards, and the like, which are " collected in Pratt and Mackenzie's Law of Highways, 19th ed., " at pages 121 and 122. The extent of the duty to warn varies, " of course, with circumstances, but, had the county council " remained the authority responsible for the 'maintenance, " 'repair and improvement' of this road, they would, in my " view, in the year 1955 have been under a duty to give some " adequate warning in the hours of darkness of the danger which " they themselves had created by the construction of this pro- " truding kerb. Having regard to the statutory provisions to " which I have referred, a 'dedication to the public'—if such " an act had any legal significance—would not, in my view, have " absolved them from this duty. Therefore, had the county " council still been the highway authority responsible for the " maintenance of this road, I do not think they would have had " any answer to the present claim. I have, of course, to consider " whether this duty has been transferred to the present " defendants."

After quoting the terms of section 32 of the Local Government Act, 1929, the judge proceeded as follows: " Under this " section, as I read it, the function of maintaining the road is " transferred to the defendants after the machinery provided for " in section 32 of the Act of 1929 has been put into operation. If " I am right in my view, that as part of the exercise of this " function the county council were obliged to take reasonable " care to give warning against dangers which they had created, " a similar duty in relation to this approach island and round- " about now, I think, vests in the defendants. The present " position, as I see it, is quite different from that considered by " the Court of Appeal in *Nash* v. *Rochford Rural Council*.[18] Here " there is no question of the transfer of a 'liability' in the legal " sense of that term. What is in fact transferred to the present " defendants under section 32 of the Local Government Act, " 1929, is a 'function of maintenance,' and that function " includes, in my view, a duty of care in relation to this " roundabout and this approach island."

It will be seen that the judge reaches his conclusion by holding, first, that the county council would have been liable to the plaintiff if they had retained responsibility for Fleet Bridge Road down to the time of the accident, on the ground that they were under a duty to take reasonable care to give warning against dangers which they themselves had created in the shape of the approach island and roundabout; and, secondly, that a similar duty devolved on the defendants when they took over the road, with the result that they were under the like liability to the

[18] [1917] 1 K.B. 384.

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plaintiff for the accident as the county council would have been under if they had retained the road; and that he assigned this duty of care to the "function of maintenance" transferred to the defendants under section 32.

As to the hypothetical case against the county council, there is, as we have said, authority for the proposition that a highway authority constructing a road for the public use under statutory powers owes a duty to the public to take reasonable care to construct the road properly, so that it will be reasonably safe for the purposes for which it is intended to be used. See, for example, *McClelland* v. *Manchester Corporation*,[19] per Lush J.; *Thompson* v. *Bradford Corporation and Tinsley*,[20] per Bailhache J., and *Baldwins Ltd.* v. *Halifax Corporation*,[21] per Atkin J. Such cases are illustrations of the general principle enunciated in *Geddis* v. *Proprietors of the Bann Reservoir*,[22] where Lord Blackburn said: "For I take it without citing cases, that it is now "thoroughly well established that no action will lie for the doing "of that which the legislature has authorized, if it be done "without negligence, although it has occasioned damage to "anyone; but an action does lie for doing that which the legis-"lature has authorized, if it be done negligently," and see also per Lord Parker of Waddington in *Great Central Railway* v. *Hewlett*.[23]

One may add that the positive act of constructing a road, if it be done negligently, may be said to amount to misfeasance and not mere non-feasance.

If there had been negligence on the part of the county council in the construction of Fleet Bridge Road and some person had been injured by a danger created by that negligence, while the county council was still in charge of the road, it may very well be that the county council would have been liable for such injury on this principle. But we are not wholly satisfied that a case of negligence could have been made out against the county council on the facts of this case. The road was built in accordance with plans approved by the Minister, and there is no doubt that it was soundly constructed. The islands and roundabout and in particular the angle of splay of the Fleet Bridge Road approach island, which was designed to guide traffic into the roundabout headed in the right direction, conformed to the Ministry's requirements, and the elaborate system of traffic signs which we have described was installed. It would not have sufficed for the purposes of a charge of negligence against the county council merely to show that the system of traffic signs or the lighting arrangements might have been improved upon. Be that as it may, we fail to see how the defendants could be held liable on

[19] [1912] 1 K.B. 118, 129, 130, 131; 28 T.L.R. 21.
[20] [1915] 3 K.B. 13, 21.
[21] (1916) 85 L.J.K.B. 1769, 1771, 1772.
[22] (1878) 3 App.Cas. 430, 455, 456.
[23] [1916] 2 A.C. 511, 519; 32 T.L.R. 707.

this principle, inasmuch as they were not the constructors of the road.

There is, no doubt, another well established principle (on which the judge chiefly founded himself) to the effect that if a highway authority place an obstruction on the highway they must take proper steps by lighting or otherwise to protect the public from the danger constituted by the obstruction. See the case cited by the judge of *Fisher* v. *Ruislip-Northwood U.D.C. and Middlesex County Council.*[24] Mr. Waller, for the plaintiff, forcibly maintained before us that although the approach island was a perfectly proper feature or adjunct of the highway it was one which would be dangerous at night in the absence of lighting or some other form of warning, and consequently that the county council on this principle brought itself under a duty to guard against danger constituted by the island they themselves had constructed, by means of lighting or some other form of warning. He said that this was a continuing obligation which passed to the defendants when they took over the road. He disclaimed reliance on the defendants' duty as lighting authority under section 161 of the Public Health Act, 1875 (on mere non-feasance in relation to which it is plain no claim could be founded) but said there was a special duty, arising out of the presence of the island, to light it or to provide some other warning of its presence. Mr. Quass, for the defendants, sought to meet this submission by contending that the island was not an obstruction but part and parcel of the highway itself. We doubt if this distinction is sound. It appears to us that the real answer to Mr. Waller's submission is that failure to light or give some other form of warning of an obstruction on the highway by a highway authority who themselves created the obstruction is taken out of the category of mere non-feasance and brought within the category of misfeasance by their positive act of creating the obstruction giving rise to the need for lighting or other means of warning. But no positive act in relation to the approach island was done by the defendants. They merely kept the island as they found it when they took over the road. The theory that the defendants inherited from the county council the duty to light or provide some other form of warning of the presence of the approach island appears to us (with respect to the judge) to be untenable in view of *Nash* v. *Rochford Rural Council.*[25]

If, therefore, the defendants are to be held liable it can only be by virtue of some express words in the Act under which the road became vested in them.

There is, however, nothing in section 32 of the Act of 1929 to impose on an urban district council taking over a county road any special obligation as to the maintenance of the road so as to exclude the ordinary immunity from civil action in respect of mere non-feasance. On the contrary, the concluding words of subsection (1) " that Council shall have the same functions as if

[24] [1945] K.B. 584.

[25] [1917] 1 K.B. 384.

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"they were as respects that road the highway authority and the "road were an ordinary road vested in them" appear to us to indicate that in such a case the general principle of immunity in respect of mere non-feasance applies.

It does not appear to us that the improvement of the lighting of the roundabout, or the provision of better means of warning by traffic signs or otherwise of the situation and shape of the Fleet Bridge Road approach island, can, as the judge thought, be classed as maintenance. Even if measures of that kind could be so classed, that would be no ground for holding that the ordinary immunity in respect of mere non-feasance in regard to maintenance was excluded. Such measures being, to our minds, clearly works of improvement as distinct from maintenance, one might say that the ordinary immunity must a fortiori apply to the defendants' omission to take them.

For these reasons we are of opinion that this action should have been held to fail in limine and would accordingly allow this appeal.

Discussion of the issue of contributory negligence is thus rendered unnecessary, but it must not be assumed that we accept the judge's finding on this aspect of the case.

Appeal allowed.

Solicitors: *Cohen, Jackson & Scott, Stockton-on-Tees; Archer, Parkin & Townsend, Stockton-on-Tees for Mace & Jones, Liverpool.*

J. A. G.

[COURT OF APPEAL.]

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May 16, 19; *July* 14.
Hodson, Romer and Sellers L.JJ.

PRESCOTT (FORMERLY FELLOWES) *v.* FELLOWES.

Husband and Wife—Settlement—Variation—Ante-nuptial settlement—Securities transferred to husband as "absolute gift"—Deed also providing for loan to husband if he became member of Lloyd's by fixed date—Provision as to loan never becoming effective—Marriage dissolved on wife's petition — Whether transferred securities or sum representing their value capable of being "property settled" over which court has jurisdiction—No element of periodical payment remaining at date of decree absolute—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.

On the day before their marriage in June, 1953, a husband and wife entered into a deed endorsed "Settlement on Marriage." By clause 1 the wife agreed "in consideration of" the intended marriage to transfer to the husband "as an absolute gift unaffected "by anything hereinafter contained" securities to the value of £15,000. By subsequent clauses the wife covenanted to provide him with a loan of £20,000 if at any time before December 31, 1955, he became qualified for membership of Lloyd's, in which event interest on the loan might become payable by him.

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Membership of Lloyd's required the husband to show assets to the value of £35,000.

On July 20, 1953, securities to the value of £15,000 were transferred to the husband. He did not become a member of Lloyd's either before December 31, 1955, or at all, and accordingly the provisions in the deed as to the loan were never implemented. The marriage was dissolved on the wife's petition on the ground of her husband's desertion of her, the decree nisi being made absolute on January 28, 1958.

The wife applied to the court to vary the provisions of the deed as an ante-nuptial settlement under section 25 of the Matrimonial Causes Act, 1950,[1] asking that the securities or the sum of £15,000 representing their value should be returned to her.

Stevenson J. held that the deed treated as a whole was an ante-nuptial settlement, notwithstanding the words "absolute gift" in clause 1; and he ordered an inquiry as to what investments or securities now represented the assets transferred to the husband. The husband appealed:—

Held, that the court had no jurisdiction to make any order under section 25 of the Act of 1950; though the deed as a whole might originally have been regarded as an ante-nuptial settlement falling within the wide interpretation given by the courts to that term in section 25 or its predecessors, there remained no "property "settled" at the date of the decree absolute which was the material date for the court's inquiry, for (*a*) the provisions relating to the loan had become wholly nugatory on January 1, 1956; and (*b*) the transfer of the securities was an absolute disposition of property in favour of the husband, albeit for good consideration, namely, marriage, and could not be treated as a "settlement" for the purposes of section 25, and was not "property settled" with reference to which the court could make any order.

Per Hodson L.J. Not every payment made and every present given by one spouse to another constitutes settled property. But if there is a gift by one spouse to another or a payment made in consideration of marriage and periodical payments in relation thereto still remain to be made at the time when the court has to inquire into the existence of a settlement, then there remains "property settled" in relation to which the court may make an order under section 25.

Dormer (orse. *Ward*) v. *Ward* [1901] P. 20; 17 T.L.R. 12 and *Hubbard* (orse. *Rogers*) v. *Hubbard* [1901] P. 157 applied.

Parrington v. *Parrington* [1951] W.N. 534; [1951] 2 T.L.R. 918; [1951] 2 All E.R. 916 and *Hindley* v. *Hindley* [1957] 1 W.L.R. 898; [1957] 2 All E.R. 653 approved.

Bosworthick v. *Bosworthick* [1927] P. 64; 42 T.L.R. 719 distinguished.

Smith v. *Smith* [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584; *Halpern* v. *Halpern* [1951] P. 204; [1951] 1 T.L.R. 461; [1951] 1 All E.R. 315 and *Brown* v. *Brown* [1937] P. 7; 53 T.L.R. 9; [1936] 2 All E.R. 1616 doubted.

Decision of Stevenson J. [1958] 2 W.L.R. 679; [1958] 1 All E.R. 824 reversed.

[1] Matrimonial Causes Act, 1950, s. 25: "The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage."

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APPEAL from Stevenson J.[2]

A wife applied to vary the provisions of a deed dated June 19, 1953, entered into on the day before the marriage, on the ground that it was an ante-nuptial settlement within the meaning of section 25 of the Matrimonial Causes Act, 1950. This was denied by the respondent husband. The wife also sought to obtain an order for the transfer to her of securities representing the sum of £15,000, or alternatively for payment to her of £15,000; but that application was modified at the hearing before Stevenson J. through her counsel, and she asked for an order for an inquiry before the registrar as to what investments or securities represented the sum of £15,000 at the date of the hearing.

The marriage took place on June 20, 1953. In May, 1954 (according to the evidence given at the hearing of the wife's petition, which was undefended), the husband deserted the wife. A decree nisi was pronounced on October 25, 1957, and that decree was made absolute on January 28, 1958. There were no children of the marriage.

The husband was a squadron-leader in the Royal Air Force and from the affidavits filed on this application it appeared that he had no resources other than his service pay. The wife's means were substantially greater than those of her husband and she was said to be substantially older. The parties were described in the certificate of their marriage merely as "of full "age."

As a result of discussions between the parties before the marriage took place, it was contemplated that the husband should resign from the Royal Air Force with a view to becoming an underwriting member of Lloyd's and that the wife should provide funds to enable him to do so and thereby acquire an income, the benefit of which the wife would, as a wife, presumably share. As a result of such discussions and of negotiations between the solicitors for the parties, the deed, the nature and effect of which was in issue, came into existence. It was called on its endorsement "Settlement on Marriage."

The body of the document recited that a marriage had been agreed on and would shortly take place between the parties. The operative part read: "Now this deed witnesseth that in consideration of the said marriage it is hereby agreed as follows:— "1. Lady Prescott" [the then name of the wife] "will "immediately after the solemnization of the said marriage trans- "fer to Squadron-Leader Fellowes as an absolute gift unaffected "by anything hereinafter contained the securities short par- "ticulars of which are set out in the schedule hereto." The schedule in question included a reference to £22 in cash, the sum which the parties believed at the date of the deed to be sufficient to bring the value of the securities specified in the schedule up to £15,000.

[2] [1958] 2 W.L.R. 679; [1958] 1 All E.R. 824.

In its second clause, the deed contained a covenant by Lady Prescott with Squadron-Leader Fellowes which provided, so far as material, that if at any time before December 31, 1955, Squadron-Leader Fellowes should produce written evidence from a recognized firm of Lloyd's underwriters that they were prepared to recommend him for membership of Lloyd's subject to his being able to show assets to the value of £35,000, and that all other conditions precedent to membership of Lloyd's had been fulfilled, Lady Prescott would pay to Squadron-Leader Fellowes the sum of £20,000, or transfer to him securities or other property or bonds, all being, so far as possible, of a nature acceptable to Lloyd's for membership, to a total value of £20,000. A proviso which followed limited Lady Prescott's obligation under the covenant to the value of her unencumbered cash securities and freehold and leasehold property at the time when she might be called on to comply with the covenant.

Clause 4 of the deed provided that the sum of £20,000, or any property representing the same transferred by Lady Prescott to Squadron-Leader Fellowes in pursuance of the covenant, should be for all purposes treated as a loan by Lady Prescott to Squadron-Leader Fellowes. It provided further for payment of interest at 5 per cent. per annum on the loan by Squadron-Leader Fellowes to Lady Prescott if demanded by Lady Prescott on the usual quarter days; but if Squadron-Leader Fellowes did not become a member of Lloyd's by March 31, 1956, or at any time ceased to be a member of Lloyd's, the loan was to be immediately repayable.

There were further provisions for securing the loan by an endowment policy of assurance on the life of Squadron-Leader Fellowes, and there were various other events provided for in the deed which were not material to the present application.

On July 20, 1953, securities to the value of £15,000 were transferred to Squadron-Leader Fellowes in pursuance of the promise in clause 1 of the deed. In the events which happened the husband did not become a member of Lloyd's before December 31, 1955, or at all.

The matter came before Stevenson J. on the report of Mr. Registrar Kinsey dated February 13, 1958. The registrar's submissions, made "with great reluctance," were: "(1) If the deed ". . . is not a settlement, the wife's application must be dis-" missed. (2) If the deed is an ante-nuptial settlement, it cannot " now be varied as asked because the fund is not in possession, " and there is no power to order the husband to pay to the wife " the value of the securities, and if this is right, the application " must be dismissed."

Stevenson J. held on March 14, 1958, that notwithstanding the use of the words "absolute gift" in relation to the securities, the deed, which must be looked at and treated as a whole, was nevertheless an ante-nuptial settlement within section 25; and he ordered that the matter should be referred to the registrar for

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inquiry as to what investments or securities now represented the £15,000, and that the application should thereafter be restored to the list. The husband, maintaining that the original securities, which he had treated as an absolute gift, had long since been sold and the proceeds mixed with his other moneys, appealed. In the Court of Appeal the requirement in the original application that, whatever had happened to the gift of securities, the husband should in any event pay the sum of £15,000 representing the value of those securities was not proceeded with.

Gerald Gardiner Q.C., *P. R. Hollins* and *A. B. Ewbank* for the husband.

Roger Ormrod Q.C., *G. H. Crispin* and *T. Coningsby* for the wife.

The following cases were cited in argument: *Chalmers* v. *Chalmers* [3]; *Dormer* (orse. *Ward*) v. *Ward* [4]; *Hubbard* (orse. *Rogers*) v. *Hubbard* [5]; *Bosworthick* v. *Bosworthick* [6]; *Prinsep* v. *Prinsep* [7]; *Melvill* v. *Melvill and Woodward* [8]; *Brown* v. *Brown* [9]; *Joss* v. *Joss* [10]; *Smith* v. *Smith* [11]; *Gunner* v. *Gunner and Stirling* [12]; *Parrington* v. *Parrington* [13]; *Hindley* v. *Hindley* [14]; *Worsley* v. *Worsley and Wignall* [15]; *Halpern* v. *Halpern*.[16]

Cur. adv. vult.

HODSON L.J. This is an appeal from an order of Stevenson J. made on an application to vary the provisions of a deed, dated June 19, 1953, as an ante-nuptial settlement. The judge held that a gift made by the petitioner wife to the respondent husband in pursuance of the provisions of the deed was property settled by her on him within the meaning of section 25 of the Matrimonial Causes Act, 1950.

The marriage took place on June 20, 1953, and the deed is endorsed "Settlement on Marriage." The marriage was dissolved by decree absolute on January 28, 1958; and the wife has invoked the jurisdiction of the court conferred by section 25. This section is the successor of earlier sections, the first of which is section 5 of the Matrimonial Causes Act, 1859; but the alterations which have been made in the language of the section dealing with variation of settlements by the legislature from time to time do not affect the question under consideration in this case, which

[3] (1892) 68 L.T. 28.
[4] [1901] P. 20; 17 T.L.R. 12.
[5] [1901] P. 157.
[6] [1927] P. 64; 42 T.L.R. 719.
[7] [1929] P. 225; 45 T.L.R. 376.
[8] [1930] P. 159; 46 T.L.R. 327.
[9] [1937] P. 7; 53 T.L.R. 9; [1936] 2 All E.R. 1616.
[10] [1943] P. 18; 59 T.L.R. 64; [1943] 1 All E.R. 102.
[11] [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584.
[12] [1949] P. 77; 64 T.L.R. 513; [1948] 2 All E.R. 771.
[13] [1951] W.N. 534; [1951] 2 T.L.R. 918; [1951] 2 All E.R. 916.
[14] [1957] 1 W.L.R. 898; [1957] 2 All E.R. 653.
[15] (1869) L.R. 1 P. & D. 648.
[16] [1951] P. 204; [1951] 1 T.L.R. 461; [1951] 1 All E.R. 315.

is whether there is here any jurisdiction to make an order. [His Lordship read the section and continued:]

The material date for the purposes of the inquiry is the date of the decree absolute of divorce. This has been established by the decision of the Court of Appeal when it was unsuccessfully argued that a settlement had come to an end at the moment of the divorce in the one case and after the divorce in the other: see *Dormer* (orse. *Ward*) v. *Ward*,[1] and *Jacobs* v. *Jacobs*.[2] [His Lordship read clause 1 of the deed, summarized its subsequent provisions in relation to the loan, and continued:]

On July 20, 1953, securities to the value of £15,000 were transferred to the husband in pursuance of the promise contained in clause 1 of the deed. The husband never became a member of Lloyd's before December 31, 1955, or at all, and the subsequent provisions of the deed therefore ceased to have effect. The position at the date of the divorce was, therefore, that, whether or no the deed in question taken as a whole might be treated as an ante-nuptial settlement, the only property which could then be dealt with by the court as property settled was the £15,000 or the securities representing the same.

It is to be observed that the transfer of securities was expressed to be an absolute gift to the husband unaffected by anything thereafter contained in the deed. It is not strictly accurate to describe the transaction as an absolute gift since it was made for good consideration, namely, marriage; but there was no settlement in the ordinary sense of the word as used by conveyancers. Nevertheless it was argued for the wife that the section has been given a wide interpretation by the courts, who have long since departed from the view that the conveyancer's conception of a settlement is of any assistance in deciding the question. Accepting this contention as correct, some effect must nevertheless be given to the word "settled" in the Act of Parliament, and the courts have, as the authorities show, recognized that it is not to be given the same meaning as if all dispositions made by one spouse in favour of the other or by a third party in favour of a spouse had been expressly included in the section.

To show the wide interpretation given from earliest times to the language of the section it is useful to refer to *Worsley* v. *Worsley and Wignall*.[3] Here an ordinary deed of separation was treated as a post-nuptial settlement and varied accordingly. The language of Lord Penzance has had, I think, influence on subsequent decisions, and I quote a passage from his judgment[4]: "The court would have a great difficulty in saying that any deed "which is a settlement of property, made after marriage, and "on the parties to the marriage, is not a post-nuptial settlement. "It would not be justified in narrowing the reasonable scope of "the words used in the section. The substance of the matter is,

[1] [1901] P. 20; 17 T.L.R. 12.
[2] [1943] P. 7; 59 T.L.R. 13; [1942] 2 All E.R. 471.
[3] (1869) L.R. 1 P. & D. 648.
[4] Ibid. 651.

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"that the legislature by this section has armed the court with "authority to make special arrangements in the case of a woman "being found guilty of adultery, in reference to property settled "upon her in her character as a wife. The substantial feature to "bring the case within the clause of the statute is, that a sum "of money is paid to a woman in her character as wife, or is "settled upon her in that character and whilst she continues a "wife."

The payments made to a spouse in his or her character as a spouse give to those payments the qualification of nuptial, but it does not follow that every payment made and every present given by one spouse to the other constitutes settled property. Were it so, highly inconvenient results would follow which in some cases might seem to be absurd if, for example, a spouse claimed the return of some trifling article of furniture given for the purpose of increasing the comfort or elegance of the matrimonial home. Wedding presents given by third parties would not necessarily be settled property although given to the spouse in her character as a spouse unless they had some characteristic which entitled them to be treated as settled property. Gifts, therefore, have been recognized by the courts as outside the scope of the section, with a qualification which will appear: see *Chalmers* v. *Chalmers*,[5] cited to and approved by the Court of Appeal in *Hubbard* (orse. *Rogers*) v. *Hubbard*.[6] In the former case an assignment of property by a wife to a husband while they were living together was held on a divorce not to be a settlement. In the latter case a husband executed a deed by which he assigned to a trustee a leasehold house and some furniture upon trust to assign the same at once to the wife absolutely and the trustee assigned the same accordingly. The judgment of Rigby L.J., agreed to by Vaughan Williams L.J. and Stirling J., was as follows[7]: "In my opinion the decision of the learned President "[Sir Francis Jeune P.] that this deed is a settlement within "the meaning of section 5 of the Matrimonial Causes Act, 1859, "cannot be supported, for the plain reason that the deed is not "a settlement at all. If we were inquiring whether the deed "ought to be set aside under section 47 of the Bankruptcy Act, "1883, different considerations would arise—considerations which "are wholly irrelevant on the present occasion. I am inclined to "say that the decision of the learned President himself in "*Chalmers* v. *Chalmers*[8] is directly in point, and is to be pre-"ferred to his decision in the present case. I do not, however, "rest my decision upon *Chalmers* v. *Chalmers*[8] as an authority; "I base it upon the general ground that this deed is not a "'settlement' in any sense, and cannot therefore be a settlement "within section 5."

This decision is binding on this court, and, unless it can be

[5] (1892) 68 L.T. 28.
[6] [1901] P. 157.
[7] Ibid.
[8] 68 L.T. 28.

validly distinguished, is in my opinion conclusive in favour of the husband.

Some difficult questions have no doubt arisen where, even though there is an absolute gift, yet the courts, again giving a wide interpretation to the section, have found a settlement to be in existence at the material date. Such a case was envisaged by Sir Francis Jeune P. during the argument in *Chalmers* v. *Chalmers*, when he said [9]: "Supposing the wife made him a "present of an annuity that would not be a settlement."

This question fell for decision in *Bosworthick* v. *Bosworthick*.[10] There a bond had been executed by a wife securing to her husband an immediate annuity of £300 for his life. Upon the dissolution of the marriage the wife applied for an order extinguishing her liability under the bond. It was unsuccessfully argued on behalf of the husband that the giving of this bond was not a settlement by the wife on the husband, and, accordingly, the court gave the answer to the question earlier posed by Sir Francis Jeune P. different from the one which in the *Chalmers* case [11] he had been inclined to give.

In reaching its decision the court expressly based itself on an earlier decision of the Court of Appeal in *Dormer* (orse. *Ward*) v. *Ward*,[12] where the Court of Appeal held that a covenant to pay a yearly sum constituted settled property, the disposition of which could be varied under the Act empowering the courts to vary settlements. The court there rejected the argument that the covenant contained in the settlement under consideration merely constituted a debt and was not property settled on the petitioner.

In *Bosworthick's* case [13] the Court of Appeal treated the bond as on the same footing as the covenant in *Dormer* (orse. *Ward*) v. *Ward*.[14] Lord Hanworth M.R. said [15]: "Following upon a "number of other decisions, there is *Dormer* (orse. *Ward*) v. "*Ward* [16] in this court, which was an application to vary a "settlement comprising a covenant by the husband to pay a "yearly sum of £200 to the wife during their joint lives. Mr. "Hewitt says that the door was open in that case to vary the "covenant, because there was also settled property included in "the settlement. With regard to the covenant to pay the "annuity, it was contended that there was no settlement except "by the owner of a limited estate subject to powers; that there "was a great distinction for that purpose between property and "power; and that the covenant for payment of the £200 per "annum merely created a debt, and was not property settled "upon the wife who was the petitioner. In dealing with that "contention—and it is quite plain from the report that the court "dealt seriatim with the liabilities under the settlement—"Vaughan Williams L.J. said [17]: 'It seems to me that the right,

[9] 68 L.T. 28, 29.
[10] [1927] P. 64; 42 T.L.R. 719.
[11] 68 L.T. 28.
[12] [1901] P. 20.
[13] [1927] P. 64.
[14] [1901] P. 20.
[15] [1927] P. 64, 69–71.
[16] [1901] P. 20.
[17] Ibid. 34.

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" ' and the only right, of the petitioner in respect of this covenant " ' is to apply to the court under section 5 to make an order for " ' the application of this £200 for her benefit. This, of course, " ' is pro tanto to vary the settlement, because, unless there was " ' a valid marriage, she, in my judgment, is not entitled to the " ' benefit of the covenant. She could not recover on the cove- " ' nant unless varied, but I think, for reasons which I have " ' already given, that the court in case of a decree of nullity " ' can and ought to vary the settlement, treating for the purpose " ' of the order that which was no marriage as if it had been a " ' valid marriage, and make the order for application for the " ' benefit of a woman not a wife of this yearly sum of £200.' " It is quite clear, therefore, that the court dealt with that " covenant separately, and although the jurisdiction of the court " was contested, yet the court held that it had power to deal " with the covenant. That decision has the greater authority " because the case had already been before Gorell Barnes J. in " the court below, and he had decided that ' property settled ' " within the meaning of section 5 of the Act of 1859 and section 3 " of the Act of 1878 referred only to that particular property the " benefit of which was, by the marriage settlement, conferred in " the ordinary way on the parties or their children, and he had " rejected jurisdiction in respect of the covenant. He appears to " have taken the view that the covenant merely created a debt, " and that he ought not to make an order dealing with it. But " on appeal, in spite of the argument urged in support of the " decision in the court below, the Court of Appeal held that it had " jurisdiction to deal with the covenant apart from the settle- " ment, and if we were to hold that there was no jurisdiction in " the present case, I think that we should be running counter to " the decision of this court in *Dormer* v. *Ward*,[17] which we " cannot do." Lord Hanworth M.R. pointed out that this was a case where payments had to be made by one spouse to the other in the character of a spouse.

The matter was put very clearly by Romer J., who said[18]: " We have had numerous authorities cited to us going as far back " as 1861, and amongst them an authority which is binding on " this court, and in my judgment those authorities establish that " where a husband has made a provision for his wife, or a wife " for her husband, in the nature of periodical payments, that " amounts to a settlement within the meaning of the sections. " That may appear to be a very liberal construction of the " sections, but I think that it is no more liberal a construction " than should be given to them having regard to the obvious " purposes for which they were enacted by the legislature."

This judgment of Romer J. was quoted in extenso in a later case, *Melvill* v. *Melvill and Woodward*,[19] where a settlement executed by a wife with the object of excluding her then husband

[17] [1901] P. 20.
[18] [1927] P. 64, 72.
[19] [1930] P. 159, 172; 46 T.L.R. 327.

from any interest in certain property was held nevertheless to be within the ambit of the section. That case has a bearing on the present as showing that the motive in entering into the settlement is irrelevant, as Romer L.J. there pointed out.[20]

In the present case the motive of the wife may well have been to give her husband the chance of becoming a member of Lloyd's by giving him £15,000 and lending him £20,000, the total sum required by the committee of Lloyd's. The motive being immaterial, one must look at the deed to see what was done, and here one finds only a transfer of securities as a completed transaction involving no periodical payments to be made thereafter. A qualification must therefore be made when one speaks of gifts out and out, or uses similar language, whether payments by one spouse to the other are expressed to be made in consideration of marriage or not. If there are periodical payments still to be made (as in *Bosworthick's* case[21]) at the time when the court has to inquire into the existence of the settlement, then, provided the nuptial element is present, there can be a settlement, or, to put it more accurately, there remains "property settled." I can find no other principle in the authorities which helps to draw the dividing line between gifts by one spouse to the other or payments made in consideration of marriage on the one hand which are not settled property and which are settled property on the other hand.

This principle was followed in *Smith* v. *Smith*[22] by Denning J., who held, in the circumstances of the case before him, that a house held by husband and wife as joint tenants was continuing provision for the future needs of the wife in her character as wife. He did, however, appear, in applying the principle, to give there a wider application thereof than the authorities warrant, and indeed himself recognized the difficulty which the authority of the Court of Appeal had put in his way, as the following passage shows[23]: "I find it difficult to reconcile the decisions in *Hubbard* "(orse. *Rogers*) v. *Hubbard*[24] and *Brown* v. *Brown*[25] with the "principle that runs through the rest of the cases on this subject. "That principle, as I understand it, is that where a husband "makes a continuing provision for the future needs of his wife "in her character as a wife, which is still continuing when the "marriage is dissolved, the provision is a 'settlement' which "can be brought before the court to see whether the provision "should continue now that she has ceased to be a wife. The "same applies to a provision by a wife for her husband or by "each or either for both. The provision usually takes the form "of periodical payments either with the intervention of trustees "as in an ordinary marriage settlement, or without them as in "a separation deed or a bond; but it may take other forms. The

[20] [1930] P. 159, 179.
[21] [1927] P. 64.
[22] [1945] W.N. 104; 61 T.L.R. 331; [1945] 2 All E.R. 584.
[23] 61 T.L.R. 331, 332.
[24] [1901] P. 157.
[25] [1937] P. 7; 53 T.L.R. 9; [1936] 2 All E.R. 1616.

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" transfer of an investment into a wife's name, whether it be a " house, or shares, or an annuity, seems to me to be in its nature " just as much a continuing provision for her future needs as is " a periodical payment. The fact that it is made for no con- " sideration other than natural affection and is in that sense a " gift does not mean that it is not a ' settlement '." He then went on to refer to the *Bosworthick* case.[26]

I respectfully agree with him in finding *Brown* v. *Brown*,[27] which was decided in the opposite way, difficult to reconcile with the principle which I extract from what was said by the Court of Appeal in *Bosworthick* v. *Bosworthick*,[28] for there was in *Brown's* case [29] a continuing provision by way of periodical payments existing at the time of decree in the form of an annuity secured by deed in favour of the husband, the annuity having been purchased by the petitioning wife for that purpose.

Denning J.'s wide application of the principle in *Smith* v. *Smith* [30] was followed by Collingwood J. in *Halpern* v. *Halpern* [31]; but I confess that in my opinion it appears that both those cases went beyond the latitude which the authorities have conferred in the liberal interpretation of the words " property settled " in the section.

The principle which I have endeavoured to state was expressly followed by Pearce J. in *Parrington* v. *Parrington*,[32] when he said: ". . . in the case before me the wife will for some years " to come have to make payments under the bond."

Similarly in the present case if the loan transaction in connexion with the £20,000 had been carried into effect it would be difficult to say that there was no " property settled " while any of the interest payments were outstanding.

The same principle was applied by Davies J., who, in *Hindley* v. *Hindley*,[33] held provisionally on an interlocutory application that two sums of money paid to a wife by a husband, one before and one after marriage, were not " property settled." He arrived at this conclusion, saying [34]: " There is, as I can see it, no " element of periodicity either with regard to the £45,000 (which " strikes me, I confess, as something more in the nature of a " present to a mistress than anything else) nor in the case of the " £68,000. And when one asks in regard to each transaction " whether anything remains to be done, or whether it is over and " done with, the answer, as I think, is that it is over and done " with."

In conclusion, I should state that although by her original application the wife claimed that the husband should, whatever had happened to the gift of securities, in any event pay the sum

[26] [1927] P. 64.
[27] [1937] P. 7.
[28] [1927] P. 64.
[29] [1937] P. 7.
[30] 61 T.L.R. 331.
[31] [1951] P. 204; [1951] 1 T.L.R. 461; [1951] 1 All E.R. 315.
[32] [1951] 2 T.L.R. 918, 922; [1951] 2 All E.R. 916.
[33] [1957] 1 W.L.R. 898; [1957] 2 All E.R. 653.
[34] [1957] 1 W.L.R. 898, 906.

of £15,000 representing the value of those securities, this application was not persisted in before the registrar who conducted the inquiry in this case, nor is it proceeded with now. It would seem that the result of this case is of mere academic interest if the appellant is right in maintaining that the original securities have long since been sold and the proceeds mixed with his other moneys. I would allow the appeal.

ROMER L.J. By the deed which is in question on this appeal, and which the wife and the husband executed upon and in consideration of their marriage, two objects were effected. It may be that in the minds of the parties these purposes were to some extent interconnected. On the face of the deed itself, however, each object had an independent legal existence. The first object was to assign to the husband for his own absolute use and benefit certain securities of the value of some £15,000 which belonged to the wife. The second purpose of the deed was to impose on the wife a contingent obligation to grant to the husband a loan of £20,000.

The agreement to transfer the securities was contained in clause 1 of the deed. The transfer was described by this clause as "an absolute gift," which it was not, because it was supported by the marriage consideration. The intention of the parties, however, in relation to the securities is quite clear, namely, that they were to pass into the absolute and unqualified ownership of the husband. The rest of the deed is taken up with the conditions on which the loan was to be granted. The object of the loan was to enable the husband to become a member of Lloyd's, if he became qualified in other respects for such membership before December 31, 1955. If the loan became payable the wife could not require repayment thereof during the husband's membership of Lloyd's and so long as the provisions of the deed were observed, save (as was later provided in the deed) through the medium of an endowment policy of assurance, which the husband was to effect on becoming a member. The loan was to bear interest at the rate of five per cent. per annum, but such interest was not to be payable unless demanded by the wife or unless the parties ceased to be treated as living together for the purposes of income tax and should become separately assessable therefor.

Inasmuch as the deed vested no property in trustees and created no successive legal or beneficial interests it had none of the attributes of a settlement which are familiar to conveyancing practitioners. It has, however, long since been established by decisions which are binding on this court that a disposition of property may constitute a "settlement" for the purposes of section 25 of the Matrimonial Causes Act, 1950, notwithstanding that it would not be regarded as a settlement of property for any other purpose. The liberality with which this legislation has been construed is sufficiently exemplified by *Bosworthick* v.

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Bosworthick.[35] In that case a wife executed, a few years after her marriage, a bond which secured to her husband an annuity for his life. The marriage was dissolved in 1925 and the wife applied to the court for an order extinguishing her liability under the bond. This court, affirming the decision of Lord Merrivale P., held that the bond was a post-nuptial settlement for the purposes of section 5 of the Matrimonial Causes Act, 1859, and section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925; and the wife's application succeeded. In the course of his judgment Romer J., who was sitting as a member of this court, said that the authorities established[36] "that where a "husband has made a provision for his wife, or a wife for her "husband, in the nature of periodical payments, that amounts "to a settlement within the meaning of the sections. That may "appear to be a very liberal construction of the sections, but I "think that it is no more liberal a construction than should be "given to them having regard to the obvious purposes for which "they were enacted by the legislature."

In view of that and other decisions it seems to me (though it is not necessary to decide the point) that the deed now in question may have constituted an ante-nuptial settlement for relevant purposes upon, and for some time subsequent to, its execution. This view is founded on the provisions of the deed which related to the loan. If the marriage had turned out successfully and if the husband had become qualified for membership of Lloyd's at any time up to December 31, 1955, the wife was liable under her covenant to provide the loan, the husband would have been liable to pay interest on it if called on to do so, and he (the husband) would have been provided with an income, some of which, presumably, would have gone towards the upkeep of the matrimonial home. It seems to me that the mutual obligations of husband and wife imposed by the deed and the payments to be effected thereunder might fairly have been regarded as "settled property" by analogy to the wife's bond to secure an annuity for the husband which was treated as settled property in *Bosworthick* v. *Bosworthick*.[36] The question, however, is immaterial, because the husband never did become a member of Lloyd's and accordingly all the provisions of the deed which related to the loan became entirely nugatory on January 1, 1956.

Section 25 of the Act of 1950 provides in effect that on the dissolution of a marriage the court may inquire into the existence of ante-nuptial or post-nuptial settlements made on the spouses and may make such orders as are therein mentioned with reference to the application of the whole or any part of the property settled. The questions in the present case would accordingly appear to be: (i) Was there in existence at the date of the decree absolute an ante-nuptial settlement made on the

[35] [1927] P. 64. [36] Ibid. 72.

wife and the husband; and (ii) If so, was there any "property "settled" upon which an order under section 25 could operate?

In my judgment both these questions quite clearly require a negative answer. In so far as the deed of June 19, 1953, might originally have been regarded as an ante-nuptial settlement for the purposes of section 25 by reason of the provisions relating to the loan, those provisions had ceased to have any effect at all nearly two years previous to the decree nisi. So far as the loan was concerned, therefore, there was no "settlement" at the date of the decree nor was there anything on which the court could lay hold as constituting settled property. It was argued before us, however (and the argument found favour with the registrar and with the judge) that the assignment of the securities by the wife to the husband rendered the deed an ante-nuptial settlement for the purposes of section 25 and that the securities themselves, or any other assets in the hands of the husband which represented the proceeds of the securities at the date of the decree, were "property settled" with reference to which an order could be made.

It would seem to me, even in the absence of authority, that an out-and-out and unqualified transfer of property by one spouse to the other cannot be regarded as a "settlement" of that property for any purpose whatever. It is indeed the very antithesis of a settlement and, widely though section 25 and its predecessors have been construed by the courts, the expressions "settlement" and "property settled" do in fact appear in the section and cannot be wholly ignored. In any case the point appears to me to have been decided by this court adversely to Lady Prescott in *Hubbard* (orse. *Rogers*) v. *Hubbard*.[37] In that case a husband assigned by deed to a trustee a leasehold house and some furniture on trust to assign the same at once to the wife absolutely; which the trustee accordingly did. The marriage was subsequently dissolved and this court held that the assignment was not a "settlement" within section 5 of the Matrimonial Causes Act, 1859, and that the court therefore had no jurisdiction to vary its provisions. Rigby L.J., in delivering the judgment of the court, said that the decision of Sir Francis Jeune P. that the deed was a settlement within the meaning of section 5 could not be supported[38] "for the plain reason that "the deed is not a settlement at all." Then, after referring to a previous decision of the President in *Chalmers* v. *Chalmers*[39] which Rigby L.J. said appeared to be directly in point and which was to be preferred to the decision under appeal, the Lord Justice proceeded[40]: "I do not, however, rest my decision upon "*Chalmers* v. *Chalmers*[41] as an authority; I base it upon the "general ground that this deed is not a 'settlement' in any "sense, and cannot therefore be a settlement within section 5."

It is true that the assignment in *Hubbard* (orse. *Rogers*) v.

[37] [1901] P. 157.
[38] Ibid. 160.
[39] 68 L.T. 28.
[40] [1901] P. 157, 161.
[41] 68 L.T. 28.

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Hubbard[42] was a gift, whereas the transfer of securities by the wife to the husband in the present case was made in consideration of marriage, but I can see no difference in principle between the two cases. The decision in *Hubbard* v. *Hubbard*[42] did not rest on the fact that the house and furniture there in question were a gift by husband to wife but on the out-and-out nature of the disposition; and the transfer of securities in the present case was precisely of that nature. The transfer was absolute and unrestricted, and after it had been effected, the husband could not have been restrained, either at law or in equity, from disposing of the securities in any manner he thought proper. Accordingly, on the principle of *Hubbard* v. *Hubbard*,[42] the deed now in question was not a "settlement" for the purposes of section 25 in relation to the transferred securities nor were the securities at any time, nor are they now, nor are any traceable assets now representing them, "settled property" with reference to which an order could be made under the section.

I am aware that there is authority which, if applied to the present case, would lead to a different result. In *Smith* v. *Smith*,[43] a husband bought a freehold house and had it conveyed to himself and his wife as joint tenants on trust for sale and the conveyance provided that the husband and wife should be beneficially entitled as joint tenants to the proceeds of sale of the house and to the net rents and profits thereof until sale. The effect of this was to constitute a gift by the husband to the wife of a joint beneficial interest in the property. Later the marriage was dissolved on the petition of the husband and he applied to the court under section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, on the footing that as the house was bought for the future benefit of both spouses the conveyance was a post-nuptial settlement for the purposes of the section. Denning J. acceded to the application and in the course of his judgment said that[44] "where a husband makes a continuing "provision for the future needs of his wife, in her character as a "wife, which is still continuing when the marriage is dissolved, "the provision is a 'settlement' which can be brought before "the court to see whether the provision should continue now "that she has ceased to be a wife. The same applies to a "provision by a wife for her husband or by each or either for "both." The judge then stated that such provision usually takes the form of periodical payments but that it might take other forms; and proceeded[44]: "The transfer of an investment "into a wife's name, whether it be a house, or shares or an "annuity, seems to me to be in its nature just as much a "continuing provision for her future needs as is a periodical "payment. The fact that it is made for no consideration other "than natural affection and is in that sense a gift does not mean "that it is not a 'settlement'."

[42] [1901] P. 157.
[43] 61 T.L.R. 331.
[44] Ibid. 332.

In *Halpern* v. *Halpern* [45] a wife, for no stated consideration, conveyed a half share in a freehold property which belonged to her, but which was not the matrimonial home, to her husband. Subsequently the wife divorced the husband and applied for the deed of conveyance to be varied as constituting a post-nuptial settlement within the meaning of section 192 of the Judicature Act, 1925. Collingwood J., after reviewing the relevant authorities, came to the conclusion that the case came within the test laid down by Denning J. in *Smith* v. *Smith*.[46] At the end of his judgment the judge said [47]: "The conveyance by the wife "to the husband was for the purpose of making a provision for "him, not, it is true, in respect of the matrimonial home, but "for the purpose of providing him with a 'house.' I do not "think that when Denning J. spoke of a 'house,' that was "restricted to the matrimonial home. It was, I think, a con-"veyance by the wife to the husband because he was her "husband, and with a view to the continuance of the matri-"monial relations between them; and it constituted a "'settlement' which can be brought before the court to decide "whether the provision made by it should continue now that "he has ceased to be her husband."

In my opinion the decisions in *Smith* v. *Smith* [48] and *Halpern* v. *Halpern* [49] go further than is warranted by the decision of this court in *Hubbard* (orse. *Rogers*) v. *Hubbard*.[50] In my judgment the result of the decisions of this court in *Hubbard* v. *Hubbard* [50] and in *Bosworthick* v. *Bosworthick* [51] is that no absolute disposition of property in favour of a spouse, whether made for consideration or not, and not being a provision in the nature of periodical payments, can be treated as a "settlement" for the purposes of section 25 of the Act; from which it follows, of course, that the property comprised in such a disposition is not "property settled" with reference to which an order under the section can be made.

Counsel for Lady Prescott sought to escape from this conclusion in the present case by suggesting that the securities were intended by both the spouses to be part and parcel of the total sum of £35,000 which was necessary to enable the husband to become a member of Lloyd's. Perhaps a sufficient answer to this contention is that if the securities had been intended to form part of the £35,000 they would not have been transferred to the husband at all, for he never did become a member of Lloyd's. But in any case it is just as clear on the face of the deed that the securities were to be passed into the sole beneficial ownership of the husband as it is that the £20,000, had it become payable, would have been a loan to the husband and nothing more.

I have not found it necessary to consider the respective merits

[45] [1951] P. 204.
[46] 61 T.L.R. 331.
[47] [1951] P. 204, 211.
[48] 61 T.L.R. 331.
[49] [1951] P. 204.
[50] [1901] P. 157.
[51] [1927] P. 64.

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of the parties in this case, for the question before us is purely one of law. I am, however, by no means prepared to accept a suggestion which I understood Mr. Gardiner to put forward on behalf of the appellant Fellowes to the effect that Lady Prescott had had a year of marriage and therefore got good value for the securities which she transferred to her husband. Married happiness cannot be assessed in terms of money; but I should have thought that £15,000 was a heavy price to pay for a year during which, as the evidence shows, the wife took second place to her fortune in the affections of her husband. It was indeed her resentment at this, and the resulting closing of her purse-strings, which seemed good and sufficient reason to the husband for taking himself elsewhere. I agree that the appeal should be allowed.

SELLERS L.J. I agree; and I have nothing to add to the reasons of my Lords.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *P. R. Kimber for Norman Caney, Putney; Culross & Co.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

1958
July 7.

PRICE *v.* HUMPHRIES.

Lord Goddard C.J., Devlin and Ashworth JJ.

Criminal Law — Evidence — Consent to institution of proceedings — Hearing of charges under National Insurance Act, 1946*—Case for prosecution closed—Objection by defence that since no consent or authorization proved no case to answer—Consent available for production—Whether prosecution entitled to prove consent after case closed—National Insurance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *s.* 53 (1).

At the hearing of informations charging the defendant with offences under the National Insurance Act, 1946, the defendant pleaded not guilty, and after the case for the prosecution was closed submitted that there was no case to answer on the ground that the prosecution had failed to prove that the proceedings had been instituted by or with the consent of the Minister or other officer as required by section 53 (1) [1] of the Act, and that since the case for the prosecution had been closed, evidence of such consent could not be admitted. The prosecutor stated that the consent was available for production if required, but the justices were of the opinion that no further evidence should be allowed to be adduced by the prosecution and dismissed the informations. On appeal:—

[1] National Insurance Act, 1946, s. 53 (1): "Proceedings for an offence "under this Act shall not be instituted except by or with the consent "of the Minister or by an inspector or "other officer authorized in that "behalf by special or general directions of the Minister."

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Held, that as proof of the consent was a matter of procedure arising on the defendant's objection which did not go to the merits, the justices were wrong in not allowing the prosecutor to produce the consent.

Rex v. *Waller* [1910] 1 K.B. 364; 26 T.L.R. 142 applied.

Rex v. *Day* (1940) 27 Cr.App.R. 168; [1940] 1 All E.R. 402 distinguished.

Per Devlin J. The point at which the consent or authority required by section 53 (1) must be proved is when the proceedings are "instituted" by the issue of a summons, and since it is the duty of the clerk to the justices or the justice who issues the summons to satisfy himself that section 53 (1) has been complied with, there is a presumption that a summons is good and prima facie proceedings are properly authorized so that there is no need for the prosecution to take any further step unless objection is made. An objection of this sort should be taken by a defendant before the case for the prosecution is closed, and then the burden is passed to the prosecution to show that the proceedings were duly authorized.

CASE STATED by Worcester justices.

On January 13, 1958, two informations were preferred by an officer of the Ministry of Pensions and National Insurance alleging that the defendant, Michael Humphries, contrary to section 52 (1) of the National Insurance Act, 1946, had, for the purpose of obtaining for himself sickness benefit under the Act, knowingly made certain false representations, namely, that because of incapacity he had not worked between certain dates, whereas in fact he had worked between those dates. At the hearing of the informations the defendant pleaded not guilty to the offences, and after evidence had been given as to the facts of the case his solicitor asked whether the case for the prosecution was closed and, upon receiving an affirmative answer, submitted that there was no case to answer. It was contended for the defendant that the prosecution had failed to prove that the proceedings were instituted by or with the consent of the Minister of Pensions and National Insurance or by an inspector or other officer authorized in that behalf as required by section 53 (1) of the Act,[1] and that, the case for the prosecution being closed, evidence of such consent or authority could not be admitted.

The prosecutor contended that proof of such authority to prosecute was unnecessary except when required by the court, and stated that it was available for production if required.

The justices were of the opinion that the objection was good in law, since it was clear from the decision in *Rex* v. *Day*[2] that after the close of the case for the prosecution no further evidence should be allowed to be adduced by the prosecution unless it was evidence upon any matter which arose ex improviso or the necessity for which no human ingenuity could have foreseen; and they considered that the authorization of the proceedings was not such a matter. They therefore dismissed the informations.

The prosecutor appealed.

[2] (1940) 27 Cr.App.R. 168; [1940] 1 All E.R. 402.

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Rodger Winn for the prosecutor.

The defendant did not appear and was not represented.

The following cases were cited in argument: *Rex* v. *Day* [2]; *Middleton* v. *Rowlett* [3]; *Reg.* v. *Dexter* [4]; *Rex* v. *Waller* [5]; *Rex* v. *Turner* [6]; *Hargreaves* v. *Hilliam*,[7] and *Rex* v. *Metz*.[8]

DEVLIN J. There are many statutes which provide that a prosecution is not to be instituted unless with the authority or consent of some particular officer such as the Director of Public Prosecutions or some other officer who has to consider the matter before the prosecution is brought, and this case stated raises a question of how and to what extent the prosecution is required to prove the existence of such authority and consent as part of its case. It concerns a prosecution brought under the National Insurance Act, 1946.

[His Lordship read section 53 (1) of the Act, referred to the case stated, as set out above, and continued:] The first thing to observe about section 53 (1) is that the authority or consent for which it provides is authority or consent that has to be given for the institution of the proceedings: "Proceedings for an offence "under this Act shall not be instituted except by or with the "consent of the Minister." Proceedings in summary jurisdiction of this sort are instituted by the laying of an information and the issue of a summons, and, when the summons is issued, that is the institution of the proceedings. The point, therefore, at which the consent or authority must be proved is when the summons is issued, and it is the duty of the clerk to the justices if application is made to him, as it generally is, for the laying of the information or the issue of the summons, to see that the requirements of section 53 are complied with, otherwise the summons will be bad. Accordingly, when the matter comes before the court the point that has to be determined, if it is necessary to determine it, is whether the summons be good or bad, whether the proceedings were instituted with or without authority. The usual practice is for the prosecution to produce the formal document to show that the summons was properly issued.

The question we have to determine is: what is the position if he fails to do so, as he did in this case? I think that the position has been dealt with, and the law has been fully laid down, in *Rex* v. *Waller*.[1] That was a case, it is true, of an indictment and of the consent of the Director of Public Prosecutions being necessary to that indictment, and the court dealt

[2] (1940) 27 Cr.App.R. 168.
[3] [1954] 1 W.L.R. 831; [1954] 2 All E.R. 277.
[4] (1899) 19 Cox 360.
[5] [1910] 1 K.B. 364; 26 T.L.R. 142.
[6] [1910] 1 K.B. 346; 26 T.L.R. 112.
[7] (1894) 58 J.P. 655.
[8] (1915) 31 T.L.R. 401; 11 Cr. App.R. 164.
[1] [1910] 1 K.B. 364; 26 T.L.R. 142.

with it in this way. Lord Alverstone C.J. said [2]: "In *Rex* v. "*Turner* [3] we considered the degree of evidence necessary to "prove the consent in cases in which proof had to be given. "The point which has now been taken is whether prima facie, "and in the absence of objection by the prisoner, any evidence "of that consent need be given at all at the trial. No doubt the "giving of the consent is a condition which must be satisfied in "fact, and unless it has in fact been given the indictment ought "not to be allowed to go before the grand jury. But how far "or under what circumstances that fact need be proved at the "trial is a different matter. Under the Vexatious Indictments "Act an indictment charging offences, in respect of which neither "the prosecutor has been bound over to prosecute nor the person "accused has been committed or bound over to appear and "defend, cannot go before the grand jury without the consent of "a judge or one of the law officers. But it is the duty of the "clerk of assize to satisfy himself before the bill is presented "to the grand jury that all the necessary steps preliminary to "indictment have been taken, and, unless objection be taken "by the prisoner that there was no consent in fact, it is to be "presumed that the clerk of assize has discharged his duty in "that respect." I think mutatis mutandis that reasoning applies to this case. It is the duty of the clerk to the justices, or whoever issues the summons, to see that it is not issued unless the consent or the authority is produced, and there is a presumption which indeed is merely a facet of the wider maxim omnia praesuumuntur rite et solenniter esse acta that the clerk has discharged his duty in that respect. Accordingly, prima facie the position was that the summons had been properly issued and there was no need for the prosecution to take any further step unless objection was taken. If objection is taken, then they must be in a position to prove it.

I should like to say a word about the position of the justices in regard to whether or not they should allow a case to be re-opened, because it may well be that they found it a rather confusing one. *Rex* v. *Turner* [4] lays it down that if the matter is one of substance the prosecution ought not to be allowed to re-open its case. On the other hand, there are authorities which show that if the matter is one of technicality, such as the proof of a statutory rule or order, or something of that sort, then the justices should allow the prosecution case to be re-opened. But where what is in issue is simply the question of whether proceedings are properly authorized, no question really arises about re-opening the prosecution case at all. I think that the application of the principle in *Rex* v. *Waller* [5] to the circumstances of this case is this: that if the prosecution is allowed without objection to close its case, then the prosecution has done all that is necessary

[2] [1910] 1 K.B. 364, 366.
[3] [1910] 1 K.B. 346; 26 T.L.R. 112.
[4] (1940) 27 Cr.App.R. 168; [1940] 1 All E.R. 402.
[5] [1910] 1 K.B. 364.

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and the summons is presumed to be a good one and properly authorized. If the defence wants to challenge that and take objection, they should take their objection before the prosecution case is closed, and having taken their objection the burden will pass to the prosecution to produce the evidence they have which shows that the proceedings were duly authorized.

For these reasons, I think that the decision of the justices was wrong, the appeal should be allowed, and that the case should go back to the justices in order that they may proceed with the hearing of it.

LORD GODDARD C.J. I agree in the result, but I desire to say that the fact that we are differing from the justices is no reflection upon them, because I can well understand that when justices have a case such as *Rex* v. *Day*[6] cited to them, and there is no answer by the prosecution citing some other authority, they may think they are bound by *Day's* case.[6] I think that possibly they might have been in greater difficulties if *Middleton* v. *Rowlett*[7] had been cited to them, for it would still more have led them to believe that they could not allow the further evidence to be given. In a case such as this justices would do well to bear in mind that there is a distinction between an objection which goes to the merits and one which goes only to procedure. If it goes to the merits and the prosecution have failed to prove something upon which the guilt or innocence of the defendant depends, justices must be very careful about allowing cases to be re-opened and must consider the doctrine laid down in *Rex* v. *Day*.[8] But if it is only a matter which goes to procedure, as this does, and as it does in a large number of cases where the consent of the Director of Public Prosecutions or some officer is required to the proceedings, then I do not think that they ought to allow an objection which has been, so to speak, kept up the sleeve until the last minute, so that when the prosecution have been induced to say: "We have closed our case," it is then said: "You have not proved consent." I think that if they bear in mind the difference between an objection which goes to the merits and one which only goes to procedure, many of the difficulties will be cleared up.

ASHWORTH J. I agree with both the judgments which have been given.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Pensions and National Insurance.*

J. F. L.

[6] (1940) 27 Cr.App.R. 168; [1940] 1 All E.R. 402.

[7] [1954] 1 W.L.R. 831; [1954] 2 All E.R. 277.

[8] 27 Cr.App.R. 168.

[CHANCERY DIVISION.]

In re C. (AN INFANT).

1958 *June* 10.

[1958 C. No. 895.]

Harman J.

Conflict of Laws—Diplomatic immunity—Family of diplomat—Infant—Ward of court—Whether infant son of person enjoying diplomatic immunity also immune—Whether father had surrendered his paternal rights—Diplomatic Privileges Act, 1708 (7 *Anne c.* 12), *s.* 3.

C., an infant, was born in Greece of Greek parents in 1943. The mother having been killed in 1947, the father remarried in 1951, and to a large extent handed over control of C. to the present wife. In 1956 the father obtained employment in the Greek Embassy in London, and as such was entitled to diplomatic immunity. At the same time he became separated from the wife. C. was not thereafter ordinarily resident with the father or under his control, but he had always had a say regarding C.'s education. The wife issued an originating summons under section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, to make the infant a ward of court, and on a procedure summons by the father to have the wife's summons set aside on the ground of his diplomatic immunity:—

Held, (1) that the father, as respondent to the summons, was entitled to have proceedings stayed on the ground of his diplomatic immunity, and the question arose whether the infant should not be added as respondent.

(2) That the infant also, as the father had not so far surrendered his parental rights as to make the infant not a member of his family, was a person entitled to diplomatic immunity, and the proceedings accordingly should be set aside.

Dictum of Lord Phillimore in *Engelke* v. *Musmann* [1928] A.C. 433, 450; 44 T.L.R. 731 considered.

PROCEDURE SUMMONS.

C., an infant, was born in Greece in 1943 of Greek parents. The mother was killed in an accident in 1947. The father studied in England from 1945 to 1950, and returned to Greece to work there from 1950 to 1955. While in England the father met an Englishwoman, and married her in 1951 after his return to Greece. After the marriage the wife took charge of C. In 1952, without demur on the father's part, she came to England with the child and installed him at her parents' farmhouse in the country. In 1953 the boy was sent back to Greece for a year to begin his schooling there, but apparently neither the father nor his wife thought it satisfactory; he came back here in 1954 and was sent to a boarding school, again, apparently, by arrangement between the two of them. The father came back to England in 1955, and in 1956 he obtained employment with the Greek Embassy, but at the same time he was separated from his wife. In 1957 the child was sent to another boarding school where he still was, and during the last two years he had spent his holidays with the wife's parents.

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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The father had had nowhere to accommodate him and there was only one week or so when he was under a roof provided by his father, and that was in the present year. Up to 1956 the father was impecunious and did not maintain the boy or educate him. Since that time he had done so because he was then in a position to do so. He now owed money to the wife which she or her parents laid out on behalf of the boy. The father was now minded to send the boy back to Greece to continue his education there. The wife was very unwilling for him to do that as she did not want the boy's education to be interrupted.

The wife accordingly issued an originating summons under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, in order that C. should be made a ward of court. The father entered a conditional appearance and asked that the proceedings should be set aside on the ground of his diplomatic immunity.

J. V. Nesbitt for the father.
D. A. Thomas for the applicant.

The only case cited in argument was referred to in the judgment.

Harman J. This is a novel application, so far as I know. The wife of the respondent, the father of the infant in question, started proceedings by originating summons under the statutory jurisdiction contained in the Law Reform (Miscellaneous Provisions) Act, 1949, to make the infant a ward of the court. The issue of the summons brought that about. The respondent is employed at the Greek Embassy and, having entered a conditional appearance, he applied to have proceedings stayed on the ground that he was entitled to diplomatic immunity. I do not myself feel any doubt that he is so entitled and would therefore be entitled to have the summons dismissed. The court could, however, add the infant as a respondent and allow the proceedings to be carried on in that way. The real struggle here is whether I ought to take that course, or whether the immunity which the respondent has claimed for himself extends to the infant, his son; that is, as I see it, a question of fact.

[His Lordship stated the facts and continued:] This court is quite used to dealing with foreign infants and has jurisdiction over them while they are in this country, whatever be their nationality, and it can and will deal with questions regarding their education, and so forth. However, the question here raised—and I think it has never been raised before—is whether, first of all, the father is entitled, under the shield of diplomatic immunity, to reject the paternal jurisdiction of the Crown, exercised through the court of Chancery. In my judgment, the answer to that question must be "Yes." I do not see why judicial jurisdiction is immune, so to speak, from diplomatic immunity. In other words, if an ambassador's son were living in the embassy, the court would and must refuse to interfere.

If one looks at the Diplomatic Privileges Act, 1708, which governs this matter, section 3 provides that immunity or protection is thrown round "any ambassador, or other public minister "of any foreign prince or state, authorized and received as such "by Her Majesty, Her Heirs or Successors, or the domestic, or "domestic servant of any such ambassador, or other public "minister." Nothing is said there about the family of the ambassador, but I cannot doubt that the immunity does extend to the family; and Lord Phillimore made a speech in the House of Lords to that effect in *Engelke* v. *Musmann*.[1] After speaking of the ambassador's personal immunity, which he cannot waive, he says[2]: "The ambassador further requires, in order that he "may effectually do his Sovereign's business, that there should "be a like immunity for his personal family, that is to say, his "wife and his children if living with him, his diplomatic family, "as it is sometimes called, that is to say, his counsellors, "secretaries and clerks, whom I take to be intended by the word "'domestic' in the statute of Anne, and his ordinary servants, "described in the statute as 'domestic servants'." Lord Phillimore was of the opinion that "family" was used in the sense of what he called "personal family," that is to say, wife and children living with the ambassador. I cannot doubt either that this immunity of the "personal family" extends to the "personal "family" of the staff of the ambassador, and by "staff" I mean those included in the list which the Foreign Office accepts, and for which there is a certificate in the present case. Halsbury's Laws of England, Vol. 7 (3rd ed.), p. 272, puts it thus: "The immunities of a diplomatic agent are extended to his family "living with him," and that is because it is considered that the ambassador or his staff ought not to be harassed so as to disturb them in the important duties which they have to perform.

Mr. Nesbitt has drawn my attention to two recent statutes which deal, not with the staff of ambassadors, but with the staff of High Commissioners. The first is the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. In that Act immunity from suit and legal process extends to what are called in section 1 (1) (*c*) "members of the family of "a chief representative or of a member of the official staff of a "chief representative entitled to immunity." That, says Mr. Nesbitt, shows the view that the legislature took in 1952 of the extent of diplomatic immunity in these days.

Similarly, in 1955, there is an Act—the Diplomatic Immunities Restriction Act, 1955—empowering Her Majesty to restrict the immunities of foreign diplomats in this country, in accordance with the restraint put on the immunities of our diplomats in foreign countries, and it provides in section 1 (1): "If it appears "to Her Majesty that the personal immunities conferred by law "on the envoys of foreign sovereign Powers accredited to Her "Majesty, their families and servants, and members of the official

[1] [1928] A.C. 432. [2] Ibid. 450.

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" staff of such envoys and their families . . ." and so I conclude that if this boy can be regarded as a member of his father's family in the sense in which those words are used by Lord Phillimore, he is also entitled to the immunity which the law throws over diplomatic representatives.

Of course he is a member of his father's family in one sense, but not, I think, for the present purpose: unless he is ordinarily resident with, or is under his father's control. It is quite true that this father has to a large extent handed over control of the boy to his present wife. The question is whether he has so far surrendered his parental rights as not to be able to claim that the boy is a member, for this purpose, of his family and, looking at it generally, I do not think I can come to the conclusion that he has so surrendered his parental rights. It is true that the boy has not stayed with him much, no doubt because the boy has stayed mostly in the country. However, he has not surrendered his control over this boy's education. He has always had a say regarding the school to which the boy should go, and now he says, " I have changed my mind. I would like him to be " educated in Greece." This is not unreasonable as the boy has Greek parents on both sides. His stepmother is an Englishwoman and would rather have him educated here, but that will not weigh very heavily unless the father has abandoned his rights, which I do not think he has. Therefore, I have come to the conclusion that the boy is a member of the family of the father and is a person to whom diplomatic immunity should be extended, just as it is to the father. He is not a person whom I should add as a respondent to the summons.

I therefore propose to set the proceedings aside.

Order accordingly.

Solicitors: *Rutland & Crauford; J. D. Langton & Passmore.*

[CHANCERY DIVISION.]

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June 3, 4, 5; *July* 2.

Harman J.

CITY AND WESTMINSTER PROPERTIES (1934) LTD. *v.* MUDD.

[1957 C. 1186.]

Contract—Construction—Deletion—Words in draft omitted in contract—Lease.

Contract—Construction—Extrinsic evidence—Lease—Covenant regarding user—Nature of premises—Knowledge of user.

Waiver—Landlord and tenant—Covenant—Breach—Covenant to use as business premises only.

Contract—Promise inducing—Lease—Covenant regarding user—Promise not to enforce.

In 1941 the defendant became the tenant of certain premises comprising a ground floor shop and basement described as a lock-up

shop, for a term of three years during which he was allowed by the landlords (the plaintiffs) to sleep in an office behind the shop. By a lease dated April 5, 1944, the plaintiffs let the premises to the defendant for a term of three years from Lady Day, 1944, the defendant covenanting not to use the premises except as a shop for his business of an antique dealer. The defendant continued to carry on business there and to sleep behind the shop and during this period he fitted up the basement rooms for residential purposes. The plaintiffs knew that the defendant slept on the premises from time to time but did not know that the property was his residence. In January, 1947, the defendant asked for a new lease and in May the plaintiffs' solicitors sent a draft, clause 2 (9) of which contained a covenant by the lessee: "To "use the demised premises as and for showrooms, workrooms "and offices only and not to use exercise or carry on (certain "specified trades and businesses) . . . and not to permit or suffer "the demised premises or any part thereof to be used as a place for "lodging dwelling or sleeping." On October 27, 1947, the defendant's solicitors returned the draft, having struck out the last part of clause 2 (9), and enclosed a letter saying that the defendant had been sleeping on the premises for some time. There followed correspondence between the solicitors. Meanwhile the plaintiffs' agent told the defendant orally that if he signed the lease the plaintiffs would make no objection to his continuing to reside there; as a result of that the defendant was willing to complete. On February 10, 1948, the lease and counterpart were exchanged, the lease omitting the words which had been struck out from clause 2 (9) of the draft by the defendant's solicitors. After the execution of the lease the defendant continued to reside and carry on business on the premises. In May, 1956, the defendant asked for a new lease and the plaintiffs' managing director having visited the premises and learned that the defendant was living there wrote giving the defendant notice to quit.

In an action for forfeiture of the lease on the ground of breach of covenant, the defendant denied that he was in breach, and alleged, alternatively, that the plaintiffs had waived the covenant or, alternatively, were estopped from relying on it. He also counterclaimed for rectification of the lease and relief against forfeiture:—

Held, (1) that on the question of construction of the covenant it was not permissible for the court to look into the past history of the matter or to rely on the fact that the defendant had been living on the premises to the plaintiffs' knowledge; nor could the fact be called in aid that express words of prohibition as to residence had appeared in the draft but were not in the lease as executed, none of these matters being surrounding circumstances which could be called in aid to construe the language used.

Caffin v. *Aldridge* [1895] 2 Q.B. 648; 12 T.L.R. 27 distinguished; *Inglis* v. *Buttery* (1878) 3 App.Cas. 552 applied.

(2) That the nature of the property, however, was a matter to be taken into consideration, and the fact that these particular premises were not suitable for a dwelling-house, taken with the fact of a covenant to use them for showrooms, workrooms and offices only, clearly showed that the defendant was in breach of covenant in using the premises for residential purposes.

Levermore v. *Jobey* [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362; *Reg.* v. *Brighton and Area Rent Tribunal, ex parte Slaughter* [1954] 1 Q.B. 446; [1954] 2 W.L.R. 289; [1954] 1 All E.R. 423 considered.

(3) That the fact that the plaintiffs knew that the defendant

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was using the premises to sleep in and were prepared to allow that did not amount to a release by them of the covenant contained in the lease.

Lloyds Bank v. *Jones* [1955] 2 Q.B. 298; [1955] 3 W.L.R. 5; sub nom. *Re Lower Onibury Farm, Onibury, Shropshire, Lloyds Bank* v. *Jones* [1955] 2 All E.R. 409 and *Wolfe* v. *Hogan* [1949] 2 K.B. 194; [1949] 1 All E.R. 570 considered.

(4) That, the defendant having signed the lease because of the promise of the plaintiffs' agent, was entitled to rely on that promise so long as he was in occupation of the shop and the action would be dismissed.

In re William Porter & Co., Ltd. [1937] 2 All E.R. 361 applied.

ACTION.

The plaintiffs in this action, City and Westminster Properties (1934) Ltd., claimed forfeiture of a lease granted to the defendant of premises known as No. 4, New Cavendish Street, W.1, on the ground of breach of covenant.

The following facts are taken from the judgment of Harman J.: The demised property consists of a ground floor and basement forming part of a block of residential flats having four storeys above the ground floor which consisted of four shops described as lock-up shops; the basements go with the shops. The defendant began his connexion with the property in 1941, when he took over the shop and basement for a term of three years. No written agreement was produced covering this period, during which it was admitted that he was allowed to sleep in the ground floor back room behind the shop. This was a war-time arrangement. The defendant was engaged in civil defence activities and it was thought a useful protection against incendiaries that he should be on the property at night. His Lordship found that no inference ought to arise from this. During this period the defendant fitted up a room in the basement in an elaborate style as a sitting room. On April 5, 1944, a lease was granted by the plaintiffs to the defendant by a document under seal whereby the landlords let " the shop on the ground floor and " the basement floor all as now in his occupation " of No. 4, New Cavendish Street for a term of three years from Lady Day, 1944, at a rent of £170 payable monthly. There were covenants by the lessee, who was described in the lease as an antique dealer, " not to use or permit the use of the said premises except as the " shop of the lessee for his business as hereinbefore described "; also not to do or suffer to be done anything which might render the premises liable to be assessed as a dwelling-house. The defendant continued to carry on his business of an antique dealer in the ground floor shop and to sleep in an office behind the shop where he had a divan bed covered in the day with a velvet counterpane. During the term of this lease the defendant fitted up another room in the basement as a dining room. Both the basement rooms had an appearance consistent with being show-rooms for antique furniture, but the defendant alleged that in

fact this furniture was not for sale and that he did not take customers down to the basement. He said in evidence that he used these rooms to live in and to entertain his friends. He had an electric cooker in the front area of the basement and a wash basin with an Ascot water heater in a lavatory at the back. He said that he made no secret of the fact that he was living on the premises and that the plaintiffs, particularly through their property manager, one Jones, were well aware of the fact. His Lordship found that the plaintiffs were aware that the defendant from time to time slept on the ground floor, but he was not satisfied on the evidence that they knew that the property was the defendant's principal or only residence or that he used the basement rooms as his home.

In January, 1947, the defendant asked for a new lease and was offered a further lease for seven years from Lady Day, 1947. Negotiations proceeded in a dilatory fashion. A draft lease was sent to the defendant in May, 1947. He continued to occupy the property as before and took no step in the matter during the summer beyond agreeing the repairing terms and the new rent. In August, 1947, Jones telephoned to the defendant, who gave some explanation of the delay and instructed his solicitors, who on October 17, 1947, returned the draft revised in red ink. By this document, as it then stood, the plaintiffs were expressed to demise to the defendant the ground floor shop and basement for the term of 14 years from Lady Day, 1947, at an annual rent rising to £325 in the last seven years of the term, payable quarterly on the usual quarter days, together with fire insurance premiums. The lessee's covenants included covenants to repair and paint, and clause 2 (9) was in the following terms: "To use "the demised premises as and for showrooms, workrooms and "offices only and not to use exercise or carry on or permit or "suffer to be used exercised or carried on in or upon the said "premises or any part thereof the trades or businesses of "—and then followed a long list of prohibited trades and businesses. The clause ended in this way: "and not to permit or suffer "the demised premises or any part thereof to be used as "a place for lodging dwelling or sleeping." There was a proviso for re-entry by the landlords upon breach of any of the lessee's covenants. At the time when the red ink revisions were made, the defendant's solicitors did not know that he had been residing on the property and intended to continue so to do. On October 27, 1947, the plaintiffs' solicitors returned the draft with various amendments in yellow ink not here relevant. The draft in this condition was submitted by the defendant's solicitors to him, when he pointed out to them the words at the end of clause 2 (9), and took objection to them on the ground that he was in fact residing on the premises and intended so to continue. On October 29 they returned the draft with the words at the end of clause 2 (9) struck out and a sidenote in green ink in these terms: "The lessee has in fact been residing at the premises for

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" some years and has spent a large sum of money on decora-
" tions." The covering letter was in these terms: " We have
" your letter returning draft lease revised, and our client accepts
" your revisions [the yellow ink revisions]. We are informed
" by our client that he has been living at the premises for some
" considerable time and has spent a large sum of money on
" decorating the rooms he occupies. Our client lives entirely
" alone and he points out that unless he resides at the premises
" he cannot obtain any burglary insurance of his very valuable
" stock of antiques. We have seen the premises the lessee occu-
" pies for his own use and they are most expensively decorated
" and furnished and we consider, therefore, that your clients are
" not in any way prejudiced by our client's user. We have,
" therefore, amended clause 2 (9) in green ink and shall be glad
" to know that your clients will accept this. If so, perhaps you
" will let us have engrossment for execution."

On this the plaintiffs' solicitors consulted their clients and advised them that permission to the defendant to reside on the premises might bring the shop and basement within the Rent Restrictions Acts. Accordingly, on November 28 the plaintiffs' solicitors wrote the following letter to the defendant's solicitors: " With reference to your letter of the 29th of last month and " the enclosure mentioned as accompanying it, we have now " received our clients' instructions that notwithstanding such " user to which these premises may have been put in the past, " they must insist upon the retention of the restriction in clause " 2 (9) which you have deleted in green ink. On hearing from " you that this is agreed, we will proceed to engross the lease " and counterpart. We cannot agree with your contention that " our clients are in no way prejudiced by the premises being used " for residential purposes; such user would probably be construed " as bringing the letting within the provisions of the Rent Restric-" tions Acts." The draft was not returned to the plaintiffs' solicitors, but the defendant's solicitors replied as follows on December 1: " We have your letter of the 28th of last month " and note what you say, but our client will, of course, require " an assurance that upon completion of the lease your clients " will take no steps to prevent his using the premises for resi-" dential purposes. As the primary letting is for business use, " we do not think the letting would be brought within the pro-" visions of the Rent Restrictions Acts, but our client cannot run " the risk of being stopped from residing on the premises while " he is the lessee." There followed a gap in the correspondence until December 31. During this interval, according to the defendant's evidence, he telephoned to Jones and told him that he would not sign the lease with a clause about not sleeping there. He added that he asked Jones to have a clause inserted stating expressly that he could sleep there, but that Jones replied that this was impossible because it was against the terms of the head-lease. This was in fact untrue, but his Lordship found that it

was clear that Jones believed his own statement. According to the defendant, Jones added that the plaintiffs would make no objection to his continuing to reside there if he would sign the lease. Jones, who had at the time of these proceedings left the employment of the plaintiffs and was only called at an adjourned hearing, stated that he had no recollection of this conversation. He admitted in cross-examination that the plaintiffs must have known that the defendant was living on the premises and said that the plaintiffs' object was to avoid the mischief of the Rent Restrictions Acts. He added that on paper his attitude was "business premises only," but that he was less emphatic when dealing with the defendant personally. On December 31 the defendant's solicitors wrote to the plaintiffs' solicitors as follows: "We have now taken our client's instructions on your letter to "us of November 28 and we understand that he himself has "spoken to your clients with reference to this. Our client is "now willing to complete the lease and we shall be glad to "receive the counterpart for execution."

The lease and counterpart were exchanged and were dated February 10, 1948. Clause 2 (9) omitted the words at the end expressly excluding lodging, dwelling or sleeping. Mr. Byford, the plaintiffs' solicitor, stated in evidence that he read the letter of December 31 as meaning that the defendant had given way and that the words at the end of clause 2 (9) were omitted by inadvertence in his office. In his Lordship's view doubt was thrown on this statement by a Mr. Turner, then the defendant's solicitor, who deposed to a conversation on the telephone with Byford. This was said to have been held just after the Christmas holiday and to have been to the effect that the defendant had spoken to his landlords and was "quite happy he would not be disturbed" and had nothing to worry about. He said in evidence that Byford said that the plaintiffs' main concern was that neighbouring tenants might complain and that it was agreed that the words struck out in green be left out and that the less said about living on the premises the better. Byford denied all recollection of this conversation and said that he took the letter of December 31 to mean that the defendant had given way. His Lordship accepted Turner's evidence on the point.

After the execution of this lease the defendant carried on business as before and continued to live on the property. In the spring of 1950 war damage repairs were done by the plaintiffs and in connexion with these Jones and one Northover came down and inspected the basement, and a little later one Kingscote, a director of the plaintiffs, also came down and inspected damage done. According to the defendant's evidence, he made it clear to them that he was living on the premises. Jones for his part said that this was far from clear to him, though he recognized that the defendant was sleeping there from time to time. In June, 1953, the defendant applied for leave to instal a bath in the basement. This was promptly refused in a letter of June 18,

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1953: "We understand from our surveyors who called upon you "yesterday that you are contemplating installing a bath in the "basement at these premises but we regret that we are unable "to agree to this matter proceeding. These premises are let solely "for business purposes, as clearly defined in the lease under "which they are held dated February 10, 1948, and any use of "the premises for residential purposes can in no way be allowed. "Our head-lease expressly excludes the use for living accommo- "dation, the premises are scheduled for business purposes and "shop only and any alteration in such use seriously prejudices our "position with our ground landlords. We shall be glad, there- "fore, to hear from you that any proposals that you have in "mind in this direction will not be proceeded with." In May, 1956, the defendant applied to the plaintiffs for a further 21 years' lease of the property and in connexion with this there were considerable negotiations, in the course of which one Nixon, then the managing director of the plaintiffs, interviewed the defendant on the property on October 1. In the course of the interview Nixon noticed signs of residence upon the property and asked the defendant if he was living there, to which the defendant replied he was and why should not he. As a result a letter was written by Nixon on the plaintiffs' behalf which contained the following passage: "It was noticed that you are using the "premises for residential purposes, which is not in accordance "with the terms of your lease as this particularly specifies that "the premises are to be used for business purposes. We therefore "request that you cease to live in the premises forthwith and "give your assurance that they will not be used for this purpose "at any time in the future. This was made perfectly clear in "our letter to you of June 18, 1953." As a result, a notice was served and plaintiffs issued a writ.

The statement of claim as drawn alleged as a breach that the defendant was residing on the premises. This the defendant denied, but admitted that he was sleeping there and always had done in order to guard the valuable stock of his business which he did not insure. He also alleged a release or waiver by the plaintiffs by reason of their knowledge prior to and during the currency of the lease of his said user, that is to say sleeping with the object of protecting the stock, and relied on acquiescence. When the action came on, the defendant desired in aid of his plea on the construction of the lease to rely on the plaintiffs' state of knowledge at the time when it was made. He also wished to rely on the doctrine of promissory estoppel. The case was adjourned to enable the pleadings to be amended. At the adjourned hearing, the defenedant added the facts which he alleged amounted to estoppel and also claimed rectification by the insertion of these words in the covenant as to user: "provided "that nothing herein shall prohibit the said Dixon Horace Mudd "from personally residing in the demised premises." The defendant, however, omitted to add a prayer in his counterclaim

to that effect. In their reply, the plaintiffs denied the plea of rectification, alleging that the intention was to complete with the omitted words at the end of clause 2 (9) expressly prohibiting residence. The plaintiffs further pleaded that if they had allowed the defendant to reside on the premises, this was only a licence which they could recall at will.

John Bradburn for the plaintiffs.
David Kemp and *A. P. Graham-Dixon* for the defendant.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

July 2. HARMAN J. read the following judgment in which he stated the facts and continued: The first question to be answered is that of construction. The words on which the plaintiffs rely are those at the beginning of clause 2 (9), "to use the demised "premises as and for showrooms workrooms and offices only," and it is argued that the plain meaning of these words is that no other use is to be made of the premises. It is said that this interpretation is affirmed by the rest of the clause which further cuts down the user by prohibiting a large number of trades or businesses. In my judgment, on the question of construction it is not permissible to look into the past history of the matter, nor to rely on the fact that the defendant had been living on the premises to the knowledge of the plaintiffs, nor even that he intended to continue to do so; nor, in my judgment, can the fact be called in aid that express words of prohibition as to residence had appeared in the draft and did not appear in the lease as executed. In commercial cases where printed forms are used, attention has been paid to words struck out. This method of construction had, I believe, the great authority of Scrutton L.J. There is an instance of it in *Caffin* v. *Aldridge*.[1] That was a commercial cause where the court had to construe the word "cargo," and they could see on the face of the document that before the word "cargo" there had been the words "full and "complete" and these had been struck through. Lord Esher M.R. said this[2]: "In order to see what it meant, one must look "at the rest of the document. We find that the words 'full and "'complete,' which were originally in the printed form, had been "struck out." Lopes L.J. also said[3]: "The words 'full and "'complete' were erased; and that could only, I think, have "been done for the purpose of showing that such was not the "intention." Kay L.J. did not allude to that matter. Whether this be legitimate, I take leave to doubt: for example in *Inglis* v. *Buttery*,[4] again a commercial case, the House of Lords held that neither letters of the parties before the contract was signed

[1] [1895] 2 Q.B. 648, 650.
[2] Ibid.
[3] Ibid.
[4] (1878) 3 App.Cas. 552.

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nor deleted words in the contract could be considered for the purpose of interpreting the intention of the parties. Lord Hatherley L.C. said this [5]: "Nor can I think, and I believe your "Lordships will concur with me in this opinion, that it is legiti- "mate to look at those words which appear upon the face of the "agreement with a line drawn through them, and which are "expressly, by the intention of all the parties to the agreement, "deleted, that is to say, done away with, and wholly abolished. "It is not legitimate to read them and to use them as bearing "upon the meaning of that which has become the real contract "between the parties, namely, the final arrangement of the docu- "ment which we must now proceed to construe." At any rate, in my judgment, that method of construction must be confined to commercial cases where the words struck out appear on the face of the signed document and cannot be extended to looking at words which appear in a draft.

All these matters which I have mentioned are not, in my judgment, surrounding circumstances which can be called in aid to construe the language used. On the other hand, the nature of the property (that is to say, whether it was obviously a dwelling-house or adapted to be used as such) are matters to be taken into consideration. This is shown by the recent case of *Levermore* v. *Jobey*,[6] where at the end of the headnote I find these words: "*Per curiam*. In construing a lease for the purpose "of deciding whether it effects a letting of a dwellinghouse the "court is not precluded from looking at the subject-matter of the "lease, namely, the property let, to ascertain whether it is or is "not adapted for living purposes." Jenkins L.J. says this [7]: "The first thing to be done, therefore, in the present case is to "look at the terms of the lease. For the purpose of construing "the lease . . . it is permissible for the court, and indeed "obligatory on it, to pay regard to the surrounding circumstances "with reference to which the lease was entered into, and in "particular to look at the nature of the subject-matter of the "letting."

My attention was called not only to this case but to another in which covenants not unlike those before me have recently been construed by the court. The earlier case is *Reg.* v. *Brighton and Area Rent Tribunal*.[8] That was a case under the Rent Restrictions Acts, the question being whether a shop with a self-contained flat over it ought to be classed as a dwelling-house. The covenant in question was that the tenant would not permit the premises to be used otherwise than for the business of a greengrocer, and it was held that so long as he carried on a greengrocer's business there he was not in breach of covenant, though he lived on the property. Lord Goddard C.J. in a reserved judgment, after quoting the covenant, said [9]: "The rule with regard to the construction of

[5] 3 App.Cas. 552, 558.

[6] [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362.

[7] [1956] 1 W.L.R. 679, 700.

[8] [1954] 1 Q.B. 446; [1954] 2 W.L.R. 289; [1954] 1 All E.R. 423.

[9] [1954] 1 Q.B. 446, 452.

" such a covenant is conveniently stated in Foa's Landlord and " Tenant, 7th edn., p. 111, and as we think that the passage " accurately states the law we will quote it instead of setting out " the various cases which deal with this point: ' A covenant, like " ' any other contract, is to be construed according to the intent " ' of the parties as expressed by their own words, and by regard " ' to the whole of the instrument, and the surrounding circum- " ' stances of the case, it being also a rule that if the words be " ' doubtful, that construction is to be taken which is most strong " ' against the covenantor.' Bearing that in mind, it is in our " opinion impossible to construe this covenant so as to prohibit " the tenant from living on the premises. Provided that the " tenant carries on a greengrocer's business it would in our " opinion be impossible, and, indeed, absurd to say that he was " in breach of his covenant because he lived on the premises. So " to hold would mean that the whole of the upper part was " sterilized, at least to the extent that the rooms could only be " used as a store or for some such purpose, and not for that for " which they were designed which the tenant is under covenant " to preserve and not to alter." The Lord Chief Justice relied largely, as will be seen, on the fact that to hold that residence was a breach would be in effect to sterilize a large part of the property and prevent it from being used for the purposes for which it was designed. To the like effect is *Levermore* v. *Jobey*,[10] already cited, where the question was similar to that in the case above cited. Here again, the covenant was construed, having regard to the nature of the demised property, not to prevent user by residence. These cases, of course, turned upon the particular words used and the surrounding circumstances; and both are here different. If the demised property consists in part of trade premises and in part of living quarters, it is natural to give the covenant a meaning which confines its operation to the trade portion and does not make the rest of the property unusable. This shop and basement are not, on the face of it, suitable for a dwelling-house. They constitute in effect one of four lock-up shops. They are adapted for shopkeeping. Consequently, when I find a covenant to use for showrooms, workrooms and offices only, coupled with a restriction covering a wide area of trades, it appears to me that this clearly means that the property is to be used for trade purposes only and then only for certain trades, and that to use the property as a dwelling-house is a clear breach of covenant. On this point, therefore, I am of opinion that the plaintiffs succeed.

I must next deal with the issue of rectification. The defendant sought to have inserted a proviso expressly allowing him to reside on the premises. Now, according to his evidence, which I accept on this point, this was the very request which he made to Jones on the telephone in December, 1947, and which Jones

[10] [1956] 1 W.L.R. 697.

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categorically refused, being under the impression this would be a breach of the covenants of the head-lease. The defendant argued that both sides did in fact intend that the defendant should be allowed to reside; but even if that be so, there was clearly no common intention to insert such a provision in the lease, for the very clear reason that the plaintiffs wished to avoid the mischief of the Rent Restrictions Acts. The plea of rectification therefore fails.

The next issue is that of waiver. Now residence, contrary to the covenants of the lease, is a continuing breach and therefore prima facie it is only waived by the acceptance of rent down to the date of that acceptance and there is a new breach immediately thereafter which is not waived. My attention was called to a number of cases which show that acts of waiver may be so continuous that the court is driven to the conclusion that there has been a new agreement for letting or a licence or a release of the covenant. The cases cited on this subject show acquiescence continuing for a very long period of years. For instance, in *Gibson* v. *Doeg* [11] the period was 20 years, in *Gibbon* v. *Payne* [12] it was 40 years, and in *Hepworth* v. *Pickles* [13] 24 years. In the more recent case of *Lloyds Bank* v. *Jones* [14] Singleton L.J. points out that no particular period such as 20 years is required. Morris L.J. says this [15]: "The judge in "his judgment held that the conduct of the landlords in "standing by from May 23, 1934, until January 31, 1951, "without protest at the respondent's non-residence on the "holding constituted waiver, or release of, or acquiescence in, "the respondent's breach of clause 15, and that the landlords "were now estopped from alleging that the respondent had committed a breach of clause 15. On the admitted facts I cannot "see that any implication arises that the landlords agreed that "they would never again insist on full performance of clause 15. "It may well be that if they accepted rent with knowledge they "waived breaches of covenant from time to time, but I can see "no reason why they should be prevented from demanding "proper compliance as from the date they required it. There "may be conduct from which can be implied the waiver or "abandonment of a right. I do not think that the landlords so "conducted themselves that they could not assert that clause 15 "should be honoured. There was no reason why after the death "of Mrs. Minnie Bach they should not say that, though they "had not been insisting upon the full and strict compliance with "the covenant in clause 15 in the past, they proposed to require "compliance for the future. The present case differs on its facts "from such cases as *Gibson* v. *Doeg* [17] and *Hepworth* v. "*Pickles*." [18] It could not here be said that a judge or a jury

[11] (1858) 2 H. & N. 623.
[12] (1905) 22 T.L.R. 54.
[13] [1900] 1 Ch. 108.
[14] [1955] 2 Q.B. 298; [1955] 3 W.L.R. 5.
[15] [1955] 2 Q.B. 298.
[17] 2 H. & N. 623.
[18] [1900] 1 Ch. 108.

"could infer from the landlords' conduct and the admitted facts "that the landlords had given some form of irrevocable licence, "or some form of release, which had the effect that the covenant "in clause 15 could not in the future be regarded as effective "and subsisting."

Again, in *Wolfe* v. *Hogan* [19] I find this in the headnote [20]: "The mere acceptance of rent by the landlord from the tenant, "after he had knowledge of the change of user by the tenant, "though it continues for some time, does not, by itself, consti-"tute such acceptance by the landlord of the changed position "as to show that the house has been let as a separate dwelling"; and Denning L.J., after dealing with the facts, says this [21]: "A "house or a part of a house originally let for business purposes "does not become let for dwelling purposes unless it can be "inferred from the acceptance of rent that the landlord has "affirmatively consented to the change of user. Let me illus-"trate that from the common law doctrine as to waiver of "forfeiture. A breach of covenant not to use premises in a "particular way is a continuing breach. Any acceptance of rent "by the landlord, after knowledge, only waives the breaches up "to the time of the acceptance of rent. It does not waive the "continuance of the breach thereafter and, notwithstanding his "previous acceptance of rent, the landlord can still proceed for "forfeiture on that account. Indeed, in the case of a continuing "breach, the acceptance of rent, after knowledge, is only a bar "to a claim for forfeiture if it goes on for so long, or is accepted "in such circumstances, that it can be inferred that the land-"lord has not merely waived the breach but has affirmatively "consented to the tenant continuing to use the premises as he "has done." I cannot think that anything proved here amounts to a release by the landlord of his rights. He knew, indeed, that the tenant was using the property to sleep in, but I do not think he knew more than that. At that he was willing to wink, but I am unable to find a release of the covenant or an agreement for a new letting. In my judgment, therefore, the plea of waiver fails.

There remains the so-called question of estoppel. This, in my judgment, is a misnomer and the present case does not raise the controversial issue of the *Central London Property Trust* v. *High-Trees House Ltd.* [22] decision. This is not a case of a representation made after contractual relations existed between the parties to the effect that one party to the contract would not rely on his rights. If the defendant's evidence is to be accepted, as I hold it is, it is a case of a promise made to him before the execution of the lease that, if he would execute it in the form put before him, the landlord would not seek to enforce against him personally the covenant about using the property as a shop

[19] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.

[20] [1949] 2 K.B. 194.

[21] Ibid. 205.

[22] [1947] K.B. 130; [1956] 1 All E.R. 256.

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only. The defendant says that it was in reliance on this promise that he executed the lease and entered on the onerous obligations contained in it. He says, moreover, that but for the promise made he would not have executed the lease, but would have moved to other premises available to him at the time. If these be the facts, there was a clear contract acted upon by the defendant to his detriment and from which the plaintiffs cannot be allowed to resile. The case is truly analogous to *In re William Porter & Co. Ltd.*[23] This is a decision of Simonds J., who said [24]: "I come to the final point, the point which has given me difficulty "in this case, and it is this." Then he states some of the facts, which were very different from the facts here, but he goes on in this way: "It was an act intended to induce the company to "take a certain course of action, to carry on its business, to enter "into transactions and to incur obligations which, but for that "resolution, it might not have done. It appears to me that there "is some direct evidence here, and, in my judgment, I am "entitled to apply the rule, stated nowhere better than in the "old case of *Cairncross* v. *Lorimer*.[25] This was a Scottish appeal "to the House of Lords, where Lord Campbell L.C. said, after "some observations which are not material to the present case [26]: "'The doctrine will apply which is to be found, I believe, in the "'laws of all civilized nations, that if a man, either by words or "'by conduct, has intimated that he consents to an act which "'has been done, and that he will offer no opposition to it, "'although it could not have been lawfully done without his "'consent, and he thereby induces others to do that from which "'they otherwise might have abstained, he cannot question the "'legality of the act he had so sanctioned, to the prejudice of "'those who have so given faith to his words, or to the fair "'inference to be drawn from his conduct.' Also, a little further "on: 'I am of opinion that, generally speaking, if a party having "'an interest to prevent an act being done has full notice of its "'having been done, and acquiesces in it, so as to induce a "'reasonable belief that he consents to it, and the position of "'others is altered by their giving credit to his sincerity, he has "'no more right to challenge the act, to their prejudice, than "'he would have had if it had been done by his previous "'licence.'" In my judgment, the defendant's evidence is to be accepted on this point. No alternative explanation of his change of mind between the beginning and the end of December, 1947, is available, and I think he was a witness of truth. His evidence was uncontradicted, for Jones remembered nothing about it.

The plea that this was a mere licence retractable at the plaintiffs' will does not bear examination. The promise was that so long as the defendant personally was tenant, so long would the landlords forbear to exercise the rights which they would have if he signed the lease. He did sign the lease on this promise and is

[23] [1937] 2 All E.R. 361.
[24] [1937] 2 All E.R. 361, 363.
[25] (1860) 3 L.T. 130.
[26] Ibid.

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therefore entitled to rely on it so long as he is personally in occupation of the shop.

The result is, that on this point the defence succeeds; and I propose to dismiss the action. I may add that if I had been of a different opinion, I should certainly have allowed the defendant relief against forfeiture under the Law of Property Act; but that, of course, would have been upon the footing that he ceased to reside or to sleep on the premises, which would have been a different result. I propose, therefore, to dismiss the counterclaim, the burden of which was rectification, a plea which failed.

Judgment for the defendant.

Solicitors: *Forbes & Son; Groos, Guest, Lowden & Hazell.*

P. P.

[COURT OF APPEAL.]

C. A.

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June 3, 4; *July* 2.

Lord Evershed M.R., Romer and Ormerod L.JJ.

In re GILLINGHAM BUS DISASTER FUND. BOWMAN AND OTHERS *v.* OFFICIAL SOLICITOR AND OTHERS.

[1956 G. No. 1308.]

Charity—Imperfect trust provision—Memorial fund—Marine cadets killed in road accident—Trusts for paying funeral expenses, care of disabled and "other worthy causes"—Void for uncertainty—Whether validated by Charitable Trusts (Validation) Act, 1954 (2 *& 3 Eliz. 2, c.* 58).

On December 13, 1951, following a road accident in which a number of Royal Marine cadets were killed and injured, a letter in the following terms was written to and published in a daily newspaper on behalf of the plaintiffs, the then mayors of the surrounding towns: "... the mayors ... have decided to promote "a Royal Marine Cadet Corps Memorial Fund to be devoted, among "other things, to defraying the funeral expenses, caring for the "boys who may be disabled, and then to such worthy cause or causes "in memory of the boys who lost their lives as the mayors may "determine."

In response to the appeal the public contributed nearly £9,000, partly in large sums from known persons but mainly anonymously as a result of street collections, football matches, whist drives, and so forth. The plaintiffs, as trustees, having spent some £2,368 in defraying funeral expenses and caring for the disabled, now sought to determine whether the trusts affecting the fund were valid charitable trusts under the Charitable Trusts (Validation) Act, 1954,[1] or otherwise; and whether the surplus was applicable cy-près for charitable purposes, or was repayable to the donors on a resulting trust.

[1] Charitable Trusts (Validation) Act, 1954, s. 1: "(1) In this Act, "'imperfect trust provision' means "any provision declaring the objects "for which property is to be held or "applied, and so describing those "objects that, consistently with the "terms of the provision, the pro-"perty could be used exclusively for "charitable purposes, but could

C. A.

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GILLINGHAM BUS DISASTER FUND, *In re.*

On appeal from Harman J., who decided that the trusts were void for uncertainty and that the Act of 1954 did not apply to validate them:—

Held (Ormerod L.J. dissenting), (1) that to come within the scope of the Charitable Trusts (Validation) Act, 1954, it had to be shown first, that there was an imperfect trust provision contained in an instrument within section 1 of the Act and, secondly, that there had been a "disposition" of property within section 2 (1) to be held or applied for the objects of that imperfect trust provision and no others.

(2) That it could not be said that the donors in making contributions in response to the appeal had "created" in these gifts a separate and distinct interest in favour of the "worthy cause" or causes" to be selected by the mayors, and, accordingly, that section 2 (3) did not apply.

Semble that the creation of a distinct interest would not be negatived by the mere circumstance that the extent of that interest is not quantified and might not at the relevant time be capable of quantification.

Per Ormerod L.J. The contribution to the fund on the understanding that it would be dealt with on the terms of the letter constitutes a disposition of property creating interests in those terms, the actual "creating" being done in each case by the contributor. If there was a right to ensure that, after satisfying specified objects, the residue of a fund should be applied for other purposes, that was an "interest," even though it might be contingent on the existence of a fund for disposal.

Decision of Harman J. [1958] Ch. 300; [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37 affirmed.

APPEAL from Harman J.

In December, 1951, following a road accident in which 24 Royal Marine cadets were killed and several more injured, the mayors of Gillingham, Rochester and Chatham decided to promote a fund in memory of the boys and to make an appeal to the public for funds for that purpose. Accordingly, the town clerk of Gillingham wrote to the editor of the "Daily Telegraph"

"nevertheless be used for purposes "which are not charitable.

"(2) Subject to the following "provisions of this Act, any im- "perfect trust provision contained in "an instrument taking effect before "December 16, 1952, shall have, and "be deemed to have had, effect in "relation to any disposition or "covenant to which this Act applies—

"(*a*) as respects the period before "the commencement of this Act, as if "the whole of the declared objects "were charitable; and

"(*b*) as respects the period after "that commencement as if the pro- "vision had required the property to "be held or applied for the declared "objects in so far only as they "authorize use for charitable pur- "poses. . . .

"(3) A document inviting gifts of "property to be held or applied for "objects declared by the document "shall be treated for the purposes of "this section as an instrument "taking effect when it is first "issued. . . ."

S. 2: "(1) Subject to the next "following subsection, this Act "applies to any disposition of pro- "perty to be held or applied for "objects declared by an imperfect "trust provision, and to any "covenant to make such a disposi- "tion, where apart from this Act the "disposition or covenant is invalid "under the law of England and "Wales, but would be valid if the "objects were exclusively charit- "able. . . .

"(3) A disposition in settlement "or other disposition creating more "than one interest in the same "property shall be treated for the "purposes of this Act as a separate "disposition in relation to each of "the interests created."

this letter, which was published on December 13, 1951: "Sir, "the mayors of Gillingham, Rochester and Chatham have "decided to promote a Royal Marine Cadet Corps Memorial "Fund to be devoted among other things to defraying the "funeral expenses, caring for the boys who may be disabled, "and then to such worthy cause or causes in memory of the "boys who lost their lives as the mayors may determine. This "tragedy has been a shock to the whole country, and in view "of the widespread messages of sympathy which have been "received, their worships feel sure that many persons would "wish to be associated with the fund, and that all concerned "would wish it to be really worthy of its objects."

About £9,000 was contributed to the fund but compensation was fully provided by the acceptance of the proprietors of the bus which did the damage of common law liability for negligence. In the event the three mayors found themselves with an unexpended balance of over £7,000, having exhausted all the purposes available to them according to the terms of the letter, except "such "worthy cause or causes in memory of the boys who lost their "lives, as the mayors may determine."

Accordingly, they, as trustees of the fund, took out a summons asking the court to determine (1) whether the trusts affecting the fund were valid charitable trusts under the Charitable Trusts (Validation) Act, 1954,[1] or otherwise; and (2) whether the surplus of the fund was applicable cy-près for some charitable purpose, or was repayable to the donors who had contributed to the fund, in the proportions of their gifts, or went to the Crown as bona vacantia.

Harman J. declared that the Act of 1954 did not apply to validate the trust, and it was void for uncertainty; that, accordingly, there could be no application cy-près, and that as the claim of the Crown of bona vacantia failed, the fund was held on a resulting trust for the donors, and he directed an inquiry as to their identity.

The Attorney-General, who claimed the surplus for charity, appealed. For the purposes of the appeal the letter was taken as a sufficient statement of the terms and purposes on and for which all the moneys would be held and applied. The Crown's claim of bona vacantia was not pursued and the Treasury Solicitor did not appear and was not represented.

Denys Buckley for the Attorney-General.
J. V. Nesbitt for the trustees.
Eric Griffith for the Official Solicitor.

No cases were referred to in argument.

Cur. adv. vult.

[1] For footnote 1 see p. 325.

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July 2. LORD EVERSHED M.R., having stated the facts, said: There is no doubt that these trusts would altogether fail for uncertainty unless the terms of the Charitable Trusts (Validation) Act, 1954, can save them by limiting such trusts to charitable purposes. Harman J. held that the case was outside the purview of that Act: and (since he rejected the claim of the Crown to the fund as bona vacantia) that the moneys must be returned to the donors if and to the extent that they could be found. The claim of the Crown to bona vacantia has not been pursued. The question, therefore, upon this appeal is whether the judge's conclusions in other respects were correct.

It will be noticed that the terms of the Act distinguish between (1) "an imperfect trust provision" which, to the extent and subject to the qualifications in the Act contained, is thereby validated, (2) the "instrument" in which the imperfect trust provision is contained, and (3) the "disposition" or "covenant" to which the Act is expressed to apply and in relation to which (alone) the validation takes effect. This threefold division of subject adds somewhat, upon the face of it, to the complexity of the Act's provisions: but its justification appears to be that whereas it is assumed that the imperfect trust provision will be contained in (though normally it will only form part of) an instrument (see, for example, section 1 (2)), the property (the beneficial enjoyment of which is, after all, the important thing to be dealt with) may be "disposed of" otherwise than by the instrument alone which contains the imperfect trust provision. A published appeal for contributions for some public cause will not by itself "dispose of" any property. The property to be held for the purposes of the appeal will be provided by contributors in response to the appeal. So, by section 2 (1), the Act is expressed to apply to any "disposition" of property to be held or applied for objects declared by an imperfect trust provision subject to the qualification at the end of the subsection.

Mr. Buckley's argument for the Attorney-General in the present appeal has applied these statutory provisions to the facts before us as follows. The relevant "instrument" is the statement of the objects of the appeal made by the mayors of Gillingham, Chatham and Rochester, published in the "Daily "Telegraph" newspaper on December 13, 1951. Harman J. observed truly that emotion is a bad foundation for such activity. One reason is that the appeal, if it expressed sincere emotional concern, manifested also a lack of the care and precision in formulation which are properly appropriate to instruments of this kind. It was suggested by Mr. Griffith that such was the looseness of its terms that the instrument conferred on the three mayors an absolute discretion to apply the moneys subscribed to any of the expressed objects to the exclusion of the rest. On this view, Mr. Buckley contended that all the terms of the instrument would form a single "imperfect trust provision" within the terms of section 1 (1) of the Act; since it would be

competent for the mayors, consistently with the terms of the instrument so construed, to apply the whole fund to some charitable purpose by way of memorial to the boys killed and injured in the accident.

But Mr. Buckley—in my view rightly—did not accept this extreme view of the effect of the instrument, which disregards entirely the significance of the words " and then " before the final phrase " to such worthy cause or causes," etc. According to Mr. Buckley, the effect and meaning of the instrument is to impose an obligation on the three mayors to apply the funds contributed *first* in payment of funeral expenses and provision of care for the disabled (nothing significant being, according to the argument, contributed by the words " among other things "), and, *subject thereto*, to apply the rest of the funds " to such worthy cause or " causes," etc. Mr. Buckley conceded that the prior obligation (for funeral expenses and care of the disabled) was wholly non-charitable: but he claimed that the residual obligation in favour of " worthy causes " was an " imperfect trust provision " within the meaning of the Act: since " worthy causes " must necessarily include charitable purposes, and since, therefore, the mayors could " consistently with the terms of the provision " apply the whole residue to some charitable purpose or purposes. But Mr. Buckley conceded that even if he were right so far, it would not suffice for the success of his argument; for the validating provisions of section 1 (2) apply only " in relation to any disposition . . . to " which the Act applies." He had, therefore, further to show that the property now remaining in the hands of the mayors had been the subject of a disposition or dispositions to be held or applied for objects declared by " the imperfect trust provision." In other words, assuming that the various sums contributed, whether through the medium of collecting boxes at football matches and the like, or otherwise, were " dispositions of " property," the donors had provided them " to be held or " applied," that is, " for the purpose of being held or applied " for the objects declared by the imperfect trust provision (namely, for " worthy causes "), and for no other purposes. To achieve this result, Mr. Buckley invoked the terms of section 2 (3) of the Act, which reads: " A disposition in settlement or other disposi- " tion creating more than one interest in the same property shall " be treated for the purposes of this Act as a separate disposition " in relation to each of the interests created."

Harman J. rejected both the essential steps in Mr. Buckley's argument. He held that the phrase " to such worthy cause or " causes," etc. was of so vague and general a character that it fell altogether outside the purview of the Act and could not, therefore, constitute an " imperfect trust provision " within section 1 (1) any more than could (say) a provision that trust property was to be applied for such purposes as the trustees should in their absolute discretion think fit. But Harman J. also rejected Mr. Buckley's claim to invoke section 2 (3) of the Act: and it is this

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latter contention which should logically be first considered, since unless Mr. Buckley can rely on section 2 (3), there is no "disposition" of property in relation to which the alleged imperfect trust provision can take effect, and his case breaks down in limine. The first question for determination is, therefore (paraphrasing and applying section 2 (3)), whether the contributors to this appeal, who must for this purpose be taken to have done so on the terms of that appeal as published, thereby created a distinct interest in the property which they contributed, namely, an interest in favour of the "worthy cause or causes" selected by the three mayors. Upon this question, Harman J. said [1]: "He"—that is, the Attorney-General—"argued that the "instrument which, be it observed, has now changed its name "from being a 'provision' to being a 'disposition,' creates three "interests in the same property (the property being the sub-"scriptions), namely, funeral expenses, care, and other worthy "causes, and that, therefore, each must be taken separately, "and, so taking them, worthy causes might all be charitable and "thus satisfy section 1 (1), . . ."

Then later on, in dealing with other points, the judge said [2]: "In my judgment, section 2 (3) cannot be called in aid, as has "been claimed, for I do not think that the letter to the news-"paper 'creates more than one interest in the same property.' "In fact, the letter created no interest in any property at all. "It was merely an appeal which had the result of producing "property in the hands of the three mayors. When they "received it they were bound to devote it to the memory of the "boys, first by the two specified non-charitable activities, and "then by using the balance for worthy objects. The first two "purposes and the worthy objects cannot be described, in my "judgment, as different interests in the same property."

Mr. Buckley challenged the judge's reasoning, in the passages cited, on the ground that he had looked rather to the terms and character of the "instrument" or of the (alleged) "imperfect "trust provision" which the instrument contained than to the "dispositions" consisting of the several contributions made in answer to, and upon the terms of, the appeal. There is, perhaps, with respect to the judge, some force in the criticism. I have earlier observed that a distinction seems to be made in the Act between the instrument, the imperfect trust provision contained therein, and the disposition in relation to which alone (so far as concerns the present case) any validation by the Act of the alleged imperfect trust provision can, according to the terms of the Act, take effect. What Mr. Buckley therefore has to show—as he concedes—is that the "dispositions," consisting of the donors' contributions, were effective to create separate and distinct interests in the subject-matter of their contributions in favour of the "worthy causes" selected by the three mayors.

[1] [1958] Ch. 300, 306; [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37.

[2] Ibid.

But I have myself come in the end to the same conclusion on this matter as Harman J. I am prepared to agree with Mr. Buckley that the creation of a distinct interest is not negatived by the mere circumstance that the extent of that interest is not quantified and may not at the present time be capable of quantification. In the simple case where a man transfers certain property to trustees and directs such trustees, out of such property, to discharge certain obligations, and subject thereto to hold any balance in favour of A, he will, I apprehend, have created a distinct interest in A; and none the less so, though the amount of the prior obligations is uncertain, and therefore the amount of the balance uncertain also.

But the present case is by no means so simple. The vital words in section 2 (3) of the Act are, in my judgment, " creating " and " created." No doubt a contributor must be taken to have transferred the property in his gift to the three mayors with the intention of its being held and applied by them for the purposes stated in their published appeal. But it does not, in my judgment, follow that the contributor thereby, and by his act alone, " created " an interest in the subject-matter of his gift in favour of the worthy objects. It is no doubt tempting to try to seek an escape from a consequence which will leave the balance of the fund contributed virtually incapable of useful application—but the duty of the court must be to interpret the Parliamentary language, and I cannot for my part give to the precise word " create " so loose and benevolent construction as Mr. Buckley's argument requires. If an interest in favour of worthy causes can be said to have been " created " at all, it must have been by the joint effect of the disposition and of the instrument or the exercise by the three mayors of their wide and ill-defined powers under the instrument; and not by the disposition alone.

In the simple example which I gave above, the " instrument " containing the directions to the trustees, and the " disposition " of the property to be applied by the trustees, were contemporaneous; and notwithstanding the distinction generally drawn in the Act between the " instrument " (or the imperfect trust provision) and the " disposition," I cannot think that the distinction was very clearly in the draftsman's mind when framing section 2 (3) of the Act. Suppose that under the trust instrument there was a power of revocation and reappointment and that, shortly after a donor had handed a sum of money to the trustees of the instrument by way of addition to the trust funds, the power was exercised, it would be extremely difficult, as I conceive, to hold on any sensible use of language that the donor had " created " separate interests in favour of the objects of the reappointment. However that may be, and whatever may be the proper significance of the words " other disposition " in section 2 (3) of the Act, I do not think in the present case that the contributors can fairly be said to have by their dispositions created separate or

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distinct interests in favour of the "worthy objects" mentioned in the relevant instrument.

If this view be thought somewhat strict and narrow, it has at least some support in common sense. I take it that by the word "interest" in the subsection is meant a legal or equitable interest of a proprietary character, recognizable as such. The judge thought that no sensible effect could be given to the three words "among other things." But prima facie some effect ought to be given to all the language in the instrument; and, if so, then the intended effect of the words may be said to have been to permit the three mayors to apply the subscribed funds for any purposes which seemed good to them, being purposes of the same kind as, and in addition to, the instances of funeral expenses and care for the disabled, as prior obligations *before* coming to the residual obligations introduced by the words "and then." The application of a large part of the moneys actually spent in providing memorial gravestones for the boys who were killed may indeed well be justified as an instance of such "other things." If this view is right, then the effect of the residual phrase "and then to "such worthy cause or causes," etc., may well be said to be so remote and uncertain as to be disqualified as a proprietary interest of any recognizable kind. And I add that the result of giving such a meaning to the words "among other things" is not to make the prior obligation itself an imperfect trust provision; for it would not appear that there is any sufficient ground for saying that (on this view) the three mayors could, consistently with the terms of the instrument, apply the moneys exclusively for charitable purposes.

I, therefore, conclude, with Harman J., that the contention of the Attorney-General fails on this ground. It is accordingly unnecessary for me to express a view of my own upon the second question, whether the phrase "to such worthy cause or causes," etc., is itself capable of constituting an imperfect trust provision. I feel, as did the judge, considerable difficulty that a formula so vague and wide as "for such purposes as the trustees "think fit" could have been within the contemplation of the Act merely because such a formula would on the face of it allow the exclusive selection of charitable purposes. But the phrase in the present case is "to such worthy . . ." and I feel also the force of Mr. Buckley's argument that such a phrase has within it at least the notion of charitable objects or objects analogous thereto: and that the sense of the phrase would not be materially different if it had run: "to such *charitable or* other worthy "causes," etc. In the circumstances, therefore, I prefer to express no view of my own upon this part of the Attorney-General's case.

I would dismiss the appeal.

ROMER L.J. Two main questions were argued on this appeal. The first question is whether the last of the objects which were

stated in the letter to the "Daily Telegraph" dated December 13, 1951, namely, "such worthy cause or causes in memory of "the boys who lost their lives as the mayors may determine," constituted an "imperfect trust provision" for the purposes of the Charitable Trusts (Validation) Act, 1954; and, secondly, on the assumption that it did, whether the contributions by the public in response to the letter constituted dispositions to which the Act applies within the meaning of section 2 (1) thereof.

Taking the second of these points first, it is clear that it only permits of an affirmative answer if the provisions of section 2 (3) of the said Act are applicable to the contributions. Mr. Buckley, for the Attorney-General, contended that they were. He conceded that neither of the first two objects set forth in the letter, namely, the defraying of the funeral expenses or caring for the boys who might be disabled, was charitable, but contended that each contribution created more than one interest in the money contributed and that the surplus now in the hands of the trustees represents a collection of separate interests created in relation to the third, or residual, object. I find myself unable to accept this view of the matter. Before section 2 (3) can apply at all to the present case it is necessary to establish (i) a "disposition" (ii) which creates more than one interest (iii) in the subject-matter of the disposition. It is, I think, clear that each contribution, whether it was of 1s. or of £100, was a "disposition"; and the only question, therefore, is whether it has been shown that the various donors created more than one "interest" in their contributions. I am quite prepared to assume that the contributors knew, or may be taken to have known, of the letter to the "Daily Telegraph," and, accordingly, that their gifts would be devoted (subject to the rather nebulous reference to "among other things") to the two objects first specified and subject thereto to the worthy causes therein mentioned. It appears, however, to be almost impossible, from a practical or common-sense point of view, to attribute to the donors an intention to create separate interests in their gifts in favour of the three objects respectively. It seems to me that the intention of a donor in writing a cheque or putting a coin in a collecting box, and the legal effect of his so doing, was to vest in the trustees a legal interest in the subject-matter of his contribution coupled with an obligation, enforceable in equity, to apply the gift in accordance with the provisions of the appeal. Subject to this, no interests, in my judgment, were "created" by the various donors in the contributions which they made. I recognize, of course, the desirability of applying the surplus of the fund which is now in question to charitable purposes cy-près; but for my part I cannot arrive at this result by holding that every person who put a coin in a collecting box created three interests (which must, of course, mean legal or equitable interests) in the coin, the third being subject to the first two. I would be disposed to agree with Mr. Buckley that it is no fatal objection that the

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donor was unable to quantify the interests, if he did in fact create them; but in my judgment no separate interests were created at all.

I, accordingly, agree with the judge on this point, and it therefore becomes unnecessary to consider whether a gift for "worthy causes," in the context of the "Daily Telegraph" letter, could properly be regarded as a disposition in favour of "an imperfect trust provision." The judge held that it could not and there appear to be powerful considerations which support his view. It may be that an "imperfect trust provision" under section 1 (1) of the Act is confined to cases where, among the declared objects for which property is to be held or applied, one at least is charitable; and that, accordingly, whilst a gift to "charitable or benevolent" objects would be within the Act, a gift to "philanthropic or benevolent" objects would not. It is not necessary, however, to express any concluded opinion upon the point, and I refrain from doing so.

I agree that the appeal should be dismissed.

ORMEROD L.J. I have had the opportunity of reading the judgments which have been delivered by my brothers and regret that I have felt compelled to reach a different conclusion.

The instrument setting out the trusts which are sought to be validated is a letter from the town clerk of Gillingham published in the "Daily Telegraph" on December 13, 1951. The material part of the letter is the first paragraph: "The mayors of Gilling-"ham, Rochester and Chatham have decided to promote a Royal "Marine Cadet Corps Memorial Fund to be devoted, among other "things, to defraying the funeral expenses, caring for the boys "who may be disabled, and then to such worthy cause or causes "in memory of the boys who lost their lives as the mayors may "determine." The language of the letter is not altogether clear, but the intention appears to be that the money collected should be devoted first to defraying the funeral expenses of the boys who were killed and caring for those who were disabled and then that any money left after satisfying these objects should be used for such worthy cause or causes in memory of the boys as the mayors should determine. The precise meaning of the letter is made more difficult to determine by the use of the words "among "other things." But these words would not appear to give the trustees of the fund a wider discretion to dispose of the money than can be derived from the words "to such worthy cause or "causes," etc.

In order that the provisions set out in the letter may be declared an "imperfect trust provision" within section 1 (1) of the Charitable Trusts (Validation) Act, 1954, the objects of the provision must be so described that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes. Mr. Buckley agreed that this fund could not be so used exclusively, as neither the defraying of funeral

expenses nor caring for the injured boys could be treated as charitable objects. Section 2 (1) provides that the Act applies to any disposition of property to be held or applied for objects declared by an imperfect trust provision. Section 2 (3) reads as follows: "A disposition in settlement or other disposition creating "more than one interest in the same property shall be treated "for the purposes of this Act as a separate disposition in relation "to each of the interests created." In the circumstances of this case, therefore, section 1 cannot apply unless the fund consists of dispositions "creating more than one interest in the same "property," and whether this is so becomes the first question for consideration. The same considerations apply, in my judgment, whether the contributions to be considered consist of substantial sums paid by cheque by individual donors, or of small coins put in collection boxes at football matches, and on other similar occasions. The large contributors may take more care to ascertain how the money is to be applied, but all the contributors must, in my view, be taken to have given their contributions to be held and applied for the objects set out in the letter. It would seem to follow that each contributor has made a disposition of property to be so held and applied. The difficult question is whether in these circumstances each contributor has made a disposition "creating more than one interest in the same property." Mr. Griffith, on behalf of the Official Solicitor, argued in the first place that this could not be so, as the trusts were discretionary throughout, and the trustees could use the whole of the fund for any of the objects set out in the letter as they thought fit. I do not accept this construction of the town clerk's letter, but if it is the right one, there is no need to consider whether section 2 (3) applies, for, as Mr. Buckley pointed out, if the trustees have an absolute discretion, there is nothing to prevent them from applying the fund exclusively for charitable purposes, and the only remaining question would be whether the letter contained an "imperfect trust provision" as defined by section 1 (1).

But it was further argued by Mr. Griffith that such a disposition as has been discussed could not be regarded as creating more than one interest in the same property, since it could not be said at any time until the first two objects of the trust had been satisfied that there would be any sum left to be devoted to the "worthy cause or causes." It is, of course, true that the sum available, if any, could not be ascertained until the funeral expenses had been defrayed and the necessary provision made for the disabled boys. Had the circumstances of the accident been such as to throw no liability on the driver of the bus or his employers, the whole of the fund might well have been absorbed in fulfilling the two objects. It happened that the bus company acknowledged their liability to compensate the disabled boys and a substantial surplus is in consequence available for other purposes. It would seem on what I regard as the right construction to be put upon the letter that the representatives of the boys

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who were killed and injured could have enforced the performance of the first two objects for their benefit if the trustees had failed in their duty, and if the objects declared by the letter for absorbing the balance, if any, had been charitable objects, I can see no reason why the trustees could not have been compelled to devote any surplus from the fund to the furtherance of such objects. This appears to be an interest in the property which has been created by the person making the disposition, none the less because the amount which would be available could not be ascertained at the time the disposition was made and in spite of the fact that no part of the fund might ever be available. Section 2 (3) begins with the words "A disposition in settlement "or other disposition." It is not difficult to envisage the different interests in the same property which may be created where a disposition is made by way of settlement. It is more difficult to conceive a disposition other than in settlement which creates more than one interest in the property if interests of the kind here being considered cannot be taken into account. If there is a right to ensure that after satisfying certain specified objects the portion of a fund remaining shall be applied for other purposes, then in my view this must be an interest, even though it may be contingent on the existence of a fund for disposal.

The judge, in dealing with this part of the case, said: "I do "not think that the letter to the newspaper creates more than "one interest in the same property. In fact the letter created "no interest in any property at all." With this I agree. At the time of the publication of the letter there was no property in which an interest could be created. In my judgment it was the contribution to the fund on the understanding that it would be dealt with in the terms of the letter which constituted a disposition of property creating interests in those terms, and the actual "creating" of the interests was done in each case by the person making the contribution.

If section 2 (3) applies, and in my judgment it does, the question then arises whether the terms of the letter contain an "imperfect trust provision" within the meaning of section 1. Section 1 (1) reads: "In this Act, 'imperfect trust provision' "means any provision declaring the objects for which property "is to be held or applied, and so describing those objects that, "consistently with the terms of the provision, the property could "be used exclusively for charitable purposes, but could never-"theless be used for purposes which are not charitable."

Looking at the objects for which the property was to be held or applied, it appears that, at the least on the face of it, the objects, although they could be used for purposes which are not charitable, could be used exclusively for charitable purposes consistently with the terms of the provision. If this be so, then it would seem that the provision is within the terms of the section. The judge referred to the long title, which reads as follows: "An "Act to validate under the law of England and Wales, and

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"restrict to charitable objects, certain instruments taking effect "before December 16, 1952, and providing for property to be "held or applied for objects partly but not exclusively charit-"able," and to enable corresponding provision to be made by the Parliament of Northern Ireland. He expressed the view that, as the long title shows, the Act was intended to cure dispositions whereby part of the trust fund is devoted to charitable purposes and part to purposes not charitable or not wholly charitable, so long as the whole of the money could be devoted to charity. It may well be that such an intention on the part of the legislature can be inferred from the long title. On the other hand, the section appears to be in unambiguous terms and it is not the rule to invoke the assistance of the long title in the interpretation of a statute except in the case of an ambiguity. It would have been an easy matter for the legislature to have defined an imperfect trust provision as one where part of the fund was devoted to charitable purposes, but that was not done. The language of the section, in my judgment, is clear, and I can see no reason why the provision in this case does not come within it.

I would allow the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Treasury Solicitor; Sharpe, Pritchard & Co. for Town Clerk, Gillingham; Official Solicitor.*

E. D.

[COURT OF APPEAL.]

GRACE RYMER INVESTMENTS LTD. *v.* WAITE AND OTHERS.

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June 26, 27; *July* 2.
Lord Evershed M.R., Romer and Ormerod L.JJ.

[1957 G. 609.]

Landlord and Tenant—Rent restriction—Premium—Rent paid in advance—Agreement to let before landlord's purchase—Three years' rent paid in advance—Whether illegal premium—Effect—Tenant let into possession before completion of landlord's purchase—Completion of purchase and legal charge—Possession application by mortgagee—Rights of tenant—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *s.* 2 (1), (5), (6).

Land Registration—Effect of registration—Mortgage—Legal charge—Transfer and legal charge registered simultaneously—Rights of tenants in possession against chargee—Land Registration Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 21), *ss.* 20 (1), 27, 70 (1) (*g*) (*k*).

In October 1955 mortgagors took three years' rent in advance from different persons who wanted flats. On November 28, 1955, the mortgagors entered into a contract to purchase this property which was registered with an absolute title at the Land Registry.

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On December 27, one of these persons went into occupation of her flat. On December 30, 1955, the purchase was completed and a transfer was duly executed by the vendor in favour of the mortgagors and on the same day a legal charge was executed by the mortgagors in favour of the plaintiff company. Both these transactions were followed by registration in accordance with sections 19 and 26 of the Land Registration Act, 1925, on January 9, 1956. The mortgagors having defaulted in their payments, the plaintiffs, as mortgagees, sought to recover possession of the property. The tenant claimed to be entitled to remain in possession:—

Held, (1) that assuming that the payment of three years' rent in advance constituted illegal payments within section 2 of the Landlord and Tenant (Rent Control) Act, 1949,[1] and that the mortgagors in requiring these payments had committed a criminal act, the tenants in making the payments were not so tainted with that criminality as to be disabled from setting up their bargain with the mortgagors and they were entitled to set up the rights they had under their contracts of tenancy.

Gray v. *Southouse* [1949] 2 All E.R. 1019 approved.

(2) That the lump sum payments were rent in advance for the purposes of the general law.

Green v. *Rheinberg* (1911) 104 L.T. 149 applied.

Braythwayte v. *Hitchcock* (1842) 10 M. & W. 494 distinguished.

(3) That the tenants as against the mortgagors had acquired "an interest in land by virtue of taking possession" under section 55 (*c*) of the Law of Property Act, 1925, and that there was a moment of time on December 30, 1955, when the mortgagors were absolute beneficial owners of the property and therefore were estopped as against the tenants from denying their rights as tenants.

(4) That section 27 of the Land Registration Act, 1925,[2] when considered with sections 19, 20 and 26 of that Act, indicated that a charge was only completed by registration; that in section 27 (3) the phrase a "charge by way of legal mortgage shall take effect "from the date of the delivery of the deed containing the same" did not mean that a legal estate was created in favour of a chargee at the moment a charge was executed; and that, accordingly, the plaintiffs, as mortgagees, must be treated as having notice of the interests of the tenants who were in occupation at the date of

[1] Landlord and Tenant (Rent Control) Act, 1949, s. 2: "(1) A "person shall not, as a condition of "the grant, renewal or continuance "of a tenancy to which this section "applies, require the payment of any "premium in addition to the rent ". . . (6) A person requiring any "premium in contravention of this "section shall be liable on summary "conviction to a fine not exceeding "one hundred pounds, and the "court by which he is convicted may "order the amount of the premium, or "so much thereof as cannot lawfully "be required under this section, to be "repaid to the person by whom it "was paid."

[2] Land Registration Act, 1925, s. 27: "(1) A registered charge "shall, unless made or taking effect "by demise or sub-demise, and subject "to any provision to the contrary "contained in the charge, take "effect as a charge by way of legal "mortgage.

"(2) Subject to the provisions of "the Law of Property Act, 1925, a "registered charge may contain in "the case of freehold land, an express "demise, and in the case of leasehold "land an express sub-demise of the "land to the creditor for a term of "years absolute, subject to a proviso "for cesser on redemption.

"(3) Any such demise or sub-"demise or charge by way of legal "mortgage shall take effect from the "date of the delivery of the deed con-"taining the same, but subject to "the estate or interest of any person "(other than the proprietor of the "land) whose estate or interest "(whenever created) is registered or "noted on the register before the date "of registration of the charge."

the charge, and the mortgagees were in no better position than the mortgagors against the tenants and were not entitled to possession as against them.

Decision of Danckwerts J. [1958] Ch. 314; [1958] 2 W.L.R. 200; [1958] 1 All E.R. 138 affirmed.

APPEAL from Danckwerts J.[3]

P. W. Waite, D. W. Waite and W. H. Waite (hereinafter called "the Waites") were dealers in property. As a result of an advertisement Mrs. Neill, the wife of the defendant Terence Neill, went to the Waites' office and was taken to see a flat at 183 Devonshire Road, Forest Hill. She was told that the rent was £2 11s. 6d. a week (inclusive of rates) and was asked for three years' rent in advance. Accordingly, she paid by cheque to the Waites the sum of £401 15s. and received from them a receipt dated October 11, 1955, for that sum "as advance rent." The receipt stated that this was payable to the Waites as "stake-holders" and that moneys were deemed to be returnable in the event of non-acceptance of tenancy by either party. It was also stated that at the end of the advance term, rent was to be paid weekly or by mutual arrangement, and that the £10 10s. letting fee was not payable until the tenant was accepted and received the key. Some time later, however, Mrs. Neill was told by the Waites that she could not have the flat, and was offered a flat at 8, Church Rise, Lewisham, the subject of the present action.

Also as the result of an advertisement the defendant, Frederick Spurling, called on the Waites on August 22, 1955, and was shown a flat at 6, Sydenham Park which was said to be available at a rent of 36s. per week. He paid a deposit of £25 and on August 26, 1955, he paid a further sum of £290 18s. making a total of £315 18s.; this was paid in cash and he was given a receipt in similar terms to that given to the Neills. His wife, however, did not like the flat, and subsequently they were shown a number of other flats. Eventually they were shown a flat on the first floor of 8, Church Rise, Lewisham, for which they were told the rent would be higher. Spurling did not object to that, but said that he could not pay any more in advance and so the Waites agreed to reduce the period for which the rent was paid in advance.

The defendant, Alexandrina Hitchen (hereinafter called "Mrs. Hitchen"), as the result of the Waites' advertisement, telephoned and was given the Waites' address and she was taken by one of the Waites to 8, Church Rise, and was shown the top flat, the rent of which was to be £2 0s. 6d. per week inclusive, three years' rent being asked in advance. £100 was paid to the Waites as a "holding deposit." She was told that she could occupy it when it was completed—in a month or six weeks. Accordingly, she gave the Waites a cheque for the balance and was told that there would be a letting fee of £10 10s. when she received the key.

[3] [1958] Ch. 314; [1958] 2 W.L.R. 200; [1958] 1 All E.R. 138.

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By a contract dated November 28, 1955, the Waites agreed to purchase the freehold property 8, Church Rise, Lewisham, from Colonel George Sinclair (who was the manager of the plaintiff company, Grace Rymer Investments Ltd.) for £2,300. By the terms of the contract the vendor agreed to leave on mortgage the sum of £1,700, repayable over a period of 12 years, the mortgage deed to be in the form already agreed. The National Conditions of Sale were incorporated in the contract, and condition No. 7 provides that if the purchaser was let into occupation of the property before the actual completion of the purchase, then, as from the date of his going into occupation and until completion, the purchaser should be the licensee and not the tenant of the vendor.

The property was registered with absolute title under the Land Registration Act, 1925. Completion took place on December 30, 1955, when a transfer in accordance with the requirements of the Act was executed by Colonel George Sinclair in favour of the Waites, and on the same day a registered charge was executed by the Waites in favour of the plaintiff company to secure the principal sum of £1,700, with interest at 6 per cent. per annum repayable by monthly instalments of £16 18s. over a period of 12 years. There was the usual provision making the whole balance secured immediately payable in case of default in payment of two consecutive instalments. The statutory powers of leasing were not excluded or limited by the charge. Both these transactions were followed by registration in accordance with sections 19 and 26 of the Land Registration Act, 1925, on January 9, 1956. The same solicitors acted for Colonel George Sinclair and the plaintiff company.

Before the completion of the Waites' purchase they had given keys of three flats to the tenants who had made payments in advance. Mr. and Mrs. Neill went into possession of the ground floor flat on December 17, 1955, Mr. and Mrs. Spurling went into possession of the middle flat on December 16, 1955, and Mrs. Hitchen went into possession of the top flat on December 27.

On July 12, 1956, instalments under the legal charge being in arrear, the plaintiff company on October 10, 1956, obtained judgment against them for £1,655 10s. 10d. and costs. On July 26, 1956, the plaintiff company appointed a receiver. As a result of the receiver's attempts to collect rents, the claims of the last four defendants, Mr. and Mrs. Neill, Frederick Spurling and Mrs. Hitchen, came to the notice of the plaintiff company. Mrs. Neill did not claim to be a tenant.

On April 8, 1957, the plaintiffs took out this summons claiming possession. The three Waites were the first three defendants to the summons, Mr. and Mrs. Neill, Frederick Spurling and Mrs. Hitchen were the last four defendants. The Waites did not contest the plaintiffs' claim. The other defendants claimed to be entitled to remain in possession as tenants.

Danckwerts J. dismissed the plaintiffs' action for possession. The plaintiffs appealed.

Harold Christie Q.C. and *Peter Oliver* for the plaintiffs.

Geoffrey Cross Q.C. and *N. C. Stogdon* for the defendants Terence Neill, Frederick Spurling and Mrs. Hitchen.

The following cases cited in argument were not referred to in the judgments: *City Permanent Building Society* v. *Miller*[4]; *Coventry Permanent Economic Building Society* v. *Jones*[5]; *E. H. Lewis & Son Ltd.* v. *Morelli*[6]; *Woods* v. *Wise*[7]; *King* v. *Earl Cadogan*[8]; *Cox* v. *Bent*[9]; *Walsh* v. *Lonsdale*[10]; *Barnhart* v. *Greenshields*[11]; *Haberman* v. *Westminster Permanent Building Society*[12]; *Samrose Properties* v. *Gibbard*.[13]

LORD EVERSHED M.R. In this case I have come to the conclusion, with all respect to the forceful arguments for the plaintiffs put to us by Mr. Christie, that Danckwerts J. rightly concluded the matter as he did.

The case arose out of the somewhat nefarious transactions of three persons called Waite, also calling themselves (with what justification I know not) estate agents. They, taking advantage of the great demand for living accommodation, succeeded in extracting sums of money from persons whom they put into occupation of houses to which they, as often as not, at the material date, had no title whatever. They then acquired some title to the premises but subjected them to mortgages. In the result conflicts have arisen between two sets of persons equally innocent, namely, the mortgagees, who are no parties to the malpractices of the Waites, and the tenants who were the victims of those malpractices.

In 1957 there came before Harman J. another such case under the name of *Hughes* v. *Waite*.[1] The general procedure followed that which I have very briefly described but in *Hughes* v. *Waite*[1] the tenant did not in fact go into possession or occupation of any part of the premises until a date later than the date of the mortgage which the Waites executed of the property itself. In the present case that vital fact is otherwise. It is a feature of this case that the three tenants all went into occupation at a date before the Waites executed their mortgage in favour of the plaintiffs, and that circumstance has given rise to the somewhat special points which have been debated before us.

[4] [1952] Ch. 840; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621.
[5] [1951] W.N. 218; [1951] 1 T.L.R. 739; [1951] 1 All E.R. 901.
[6] [1948] W.N. 442; [1948] 2 All E.R. 1021.
[7] [1955] 2 Q.B. 29; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767.
[8] [1915] 3 K.B. 485.
[9] (1828) 5 Bing. 185.
[10] (1882) 21 Ch.D. 9.
[11] (1853) 9 Moo.P.C. 18.
[12] [1950] 2 K.B. 294; 66 T.L.R. (Pt. 1) 1068; [1950] 2 All E.R. 16.
[13] [1958] 1 W.L.R. 235; [1958] 1 All E.R. 502.
[1] [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603.

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There are three defendants, and the facts in regard to them were found by the judge in the course of his very full and careful judgment. For simplicity I shall take the case of one of these tenants, namely, Mrs. Hitchen. She first came into contact with the Waites in the month of October, 1955. She then arranged with the Waites that she should get a tenancy of the top floor at 8, Church Rise, Lewisham. Mrs. Hitchen was called as a witness so as to be available for cross-examination upon her affidavit. The substance of the matter, as the judge found, was that a somewhat loose arrangement or bargain was made at that date that she should have a tenancy of this top floor flat as a weekly tenant at a weekly rent of £2 0s. 6d. which should be inclusive of rates. But it was an essential part of the bargain, and one upon which the Waites insisted as being essential to their machinations, that she should pay 156 weeks' rent in advance; and that she did. She was given a receipt which states upon the face of it that the Waites had received £315 18s. being 156 weeks' or three years' advance rent for the flat. The date in October which that receipt bears is one on which the Waites in fact had no interest in the premises 8, Church Rise whatever; nor did Mrs. Hitchen then go into possession. But in the following month, on November 28, the Waites entered into a contract to purchase the whole house (including the top flat) from Colonel Sinclair for the sum of £2,300. The completion date was stated in the contract as December 19, but completion in fact took place on December 30.

In the meantime, however, a vital and important event occurred. On December 27, three days before completion, Mrs. Hitchen, who had been sent the key of the flat by post, went into occupation. On December 30 the contract for sale was completed in the sense that a transfer of the property, which was registered property, was duly executed in favour of the Waites by Colonel Sinclair. On the same date, the Waites executed a mortgage by way of legal charge in favour of the plaintiffs for a sum of somewhat less than the purchase price. The registration, both of the transfer and the legal charge, occurred on January 9.

Let me repeat and emphasize the significance of the dates. First, there was the oral bargain under which the Waites promised to give Mrs. Hitchen the right of occupying the top flat at 8, Church Rise as a weekly tenant at £2 0s. 6d. a week, provided she paid three years of that rent in advance. Next there was the contract by the Waites for the purchase of the property including the flat. Next Mrs. Hitchen, in pursuance of the arrangement with the Waites, went into possession, the Waites of course, at that time having under the contract an equitable right to the property subject to defeasance in the event of non-completion. Next, there was the completion on December 30 which had the effect of making the legal owner a trustee of the legal estate absolutely for the Waites; but immediately afterwards

there was an effective charge in favour of the plaintiffs and, finally, the registration on January 9.

I need not refer to the other cases of Spurling and Neill, because, in essentials, the facts are the same and in neither case is there any fact less favourable to the plaintiffs than in the Hitchen case.

On those facts, as I have briefly stated them, Mr. Christie for the plaintiffs has argued that Mrs. Hitchen took no interest in the premises notwithstanding her occupation from December 27: first, because the bargain was incapable of being made effectively by parol, and further because, as he has contended, the sum paid of £315 18s. was not rent, and, accordingly, when she did go into possession, she could never say that she was there on the terms of payment of rent. She paid no rent thereafter, and, as I have said, according to that argument, she paid no rent at any time. Mr. Christie says that at best she had some kind of contract against the Waites but not such as was ever sufficient for, or could have been the subject of, a decree for specific performance. The result of that is, Mr. Christie says, that Mrs. Hitchen never acquired an effective right even against the Waites to remain in occupation, and, therefore, a fortiori, she never got any right whatever which was effective against the mortgagees for whom he appears.

He has argued two further points. First, he says that, whatever else may have been the position, whatever other might have been the situation, if this had not been registered land, the fact that it is registered land entitled the plaintiff to rely upon section 27 (3) of the Land Registration Act, 1925, which, he argued, makes the legal charge granted to the plaintiffs effective from its own date, notwithstanding that it was not registered until January 9, and so, according to the terms of section 27 (3), would override any equitable or contractual or other interest which Mrs. Hitchen might have had.

Second and last, Mr. Christie has contended that, whether or no the sum of £315 18s. might be called rent for any purposes, it certainly amounted to a premium unlawfully required under the Rent Restriction legislation, that the Waites committed a criminal offence in demanding it, and that Mrs. Hitchen was particeps criminis in paying it and cannot in the circumstances rely upon the bargain which put her in occupation of which this illegal transaction was a part. Those were his contentions and Danckwerts J. rejected them.

In my judgment, the vital matter to determine in this case is what were the rights of Mrs. Hitchen, if any, as against the Waites when she went into possession, and, particularly, thereafter at the point of time on December 30 when the Waites' contract to purchase was completed. But since the illegality point, if I may so describe it, is in a sense fundamental to the whole issue, it is perhaps convenient to dispose of that first. If the truth is that the bargain was so tainted with illegality that

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Mrs. Hitchen cannot rely on it, that would be a conclusion of the whole matter. But, in my judgment, it clearly was not. The essential section is section 2 of the Landlord and Tenant (Rent Control) Act, 1949. By subsection (6) of section 2 it is enacted that "a person requiring any premium in contravention of this "section shall be liable on summary conviction to a fine" indicating, of course, that it is a criminal offence so to require. The fact that it is illegal to require rather than accept the payment was considered fully by this court in the case of *Woods* v. *Wise*.[2] In the course of that case, my brother Romer expressed the view that the payment of a sum by way of satisfaction and in advance of the rent was a premium within the Rent Restriction legislation. Birkett L.J. and I, the other members of the court, expressed no view on that matter, and I think in the present case it is equally unnecessary to express a view whether the £315 18s. was "a premium" within the Rent Acts; but if it was—and I am now assuming for the purposes of the argument that it was a premium—undoubtedly the Waites committed a criminal act in requiring the payment of £315 18s. as a condition of the grant of the rights of occupation which they promised. But, in my judgment, it does not follow that Mrs. Hitchen by paying it was so tainted with the criminality of the Waites as to disable her from setting up her bargain in any form at all. There have been suggestions that by paying such a premium a tenant might be tainted, and one such case is *Hitchcock* v. *Waite*[3] before Vaisey J., a case also concerned with the Waites. There is no authority with regard to the matter in this court, but there is a decision of Devlin J. in *Gray* v. *Southouse*,[4] which was cited to and relied upon by Danckwerts J. for the view that a tenant, who had been prevailed upon to submit to a demand for payment of rent in advance, ought not to be treated as disabled from having any rights under the contract for that reason. I agree with that view and I think also that the proviso to subsection (5) of section 2 of the Landlord and Tenant (Rent Control) Act, 1949, would strongly support the same view. The proviso relates to the case of a demand of a premium made after March 25, 1949, but before the commencement of the Act of 1949—during a period, therefore, when to demand it would, apart from the Act of 1949 have been perfectly lawful. The Act of 1949 in this respect takes effect as regards all agreements made after March 25 subject to the proviso. Therefore, without the proviso, the result might be that a bargain, at the time it was entered into being perfectly lawful, would result in rights against the landlord which arose exclusively out of the later legislation. It was therefore thought obviously proper that such an agreement—that is an agreement made since March 25 but before the commencement of the Act of 1949—should be voidable at the suit of either party. This court has held

[2] [1955] 2 Q.B. 29; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767.

[3] *The Times*, May 30, 1957, at p. 15.

[4] [1949] 2 All E.R. 1019.

that it is only voidable when it is executory. If the premium has already been paid then neither the landlord nor the tenant can rely upon the proviso and say that the executed agreement is voidable. But if the argument as to illegality is right, that is, if a landlord who demanded a premium after the coming into operation of the Act of 1949 (when he could not deny that it was quite illegal) should be able to turn round and deny to the tenant his rights which the contract purported to give him, then it seems to me to lead to a very strange result, for he would be in a stronger position than the innocent landlord who had made his bargain at a time when it was not illegal to do so. Therefore, I reject, as did the judge, the proposition that Mrs. Hitchen is debarred by participating in a criminal act from asserting any right she may have under her contract of tenancy.

I have referred for the purposes of the Rent Act of 1949 to the effect of the payment of this sum of £315 18s.; but Mr. Christie has contended that for the purposes of the Law of Property Act, 1925, and the general law, the £315 18s. equally lost all the characteristics of rent and was a mere premium. He relied upon *Braythwayte* v. *Hitchcock*[5] as showing that Mrs. Hitchen, though she went into occupation, had no rights against the landlord because no rent was paid by her. Parke B. in that case said "Although the law is clearly settled, that where there "has been an agreement or a lease, and an occupation without "payment of rent, the occupier is a mere tenant at will; yet it "has been held that if he subsequently pays rent under that "agreement, he thereby becomes tenant from year to year." So it is contended that, according to the ordinary law, Mrs. Hitchen never got any better right than a pure licensee or a tenant at will. I am unable to agree with that view, nor do I think that Parke B.'s statement leads to that result. He was dealing only with a case where one, having made an agreement providing for the payment of rent, has gone into possession but has failed to pay at the relevant date any rent at all. It seems to me that, on the facts of this case, when Mrs. Hitchen went in she must be treated as having paid the rent for a period; and the terms of the receipt clearly support that view. So, when I come to look at the section of the Law of Property Act, 1925, which is relied upon, I am far from saying that (in so far as section 54 (2) might otherwise apply) this is a case in which all that happened was that there had been a sum of money taken but no rent paid. In this respect the case may be reasonably said to be likened to that of *Green* v. *Rheinberg*.[6] In that case there had been a lease executed in favour of a lessee which, on the face of it, showed that the rent was payable periodically in the ordinary way, but by collateral arrangement the landlord had taken a lump sum in satisfaction of the rent over a period of years. Unfortunately for him, the mortgagee there had notice of the counterpart lease which he had seen but had omitted to make any further inquiry and assumed

[5] (1842) 10 M. & W. 494.

[6] (1911) 104 L.T. 149.

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that the parties were regulating their conduct according to its terms, and the mortgagee was held to be bound by the rights which the lessee had as against his landlord not according to the terms of the counterpart of the lease but according to the facts which were that he had paid the rent in advance and therefore no further rent was payable until the period had elapsed. It will be observed that the lessee was not in that case disentitled to his rights because he had so paid his rent in advance. So in this case it would appear to me that Mrs. Hitchen, when she was let into possession, could say: "I am a weekly tenant at £2 0s. 6d. "and I have paid a sum which the landlord has accepted in "satisfaction of my obligation to pay rent for a period of three "years." In fact the period was 156 weeks which, if it is relevant, is slightly less (by four days) than three years. It seems to me also right to say (if it be necessary) that her rights, if they are in other respects available to her, would be limited to three years' occupation and would not involve, as was the result in one of the other cases, a promise of occupation for three years plus one week.

I come now to consider what her rights were against the Waites. She was and is entitled, as against them, to say, under the provisions of section 55 of the Law of Property Act, 1925, that she acquired "an interest in land by virtue of taking possession." She had gone into possession and she was there under the terms of the agreement; and it seems to me, as this court has laid down, that there was a moment of time on December 30 when the Waites were absolute beneficial owners of the property and therefore would be estopped as against her from denying her rights as their tenant to remain in occupation for the period for which she had paid rent. Whether that interest was an interest which equity would specifically enforce, or whether it was a mere contractual right, seems to be irrelevant. Mrs. Hitchen having gone into occupation and acquired that right against the Waites, they could not and would not have been allowed by the court to assert against Mrs. Hitchen that they could evict her.

But that still leaves the question: Are the plaintiffs, the mortgagees, in any different position? That brings me to a point which has been much pressed upon us arising under the Land Registration Act, 1925, to which I have already briefly referred. The argument depends upon the true interpretation of section 27 (3). I should mention one or two earlier sections. By section 19 (1) it is provided that transfers of registered estates in land shall be completed by the registrar "entering on the "register the transferee as the proprietor of the estate trans-"ferred, but until such entry is made the transferor shall be "deemed to remain proprietor of the registered estate." Subsection (2) provides: "All interests transferred or created by "dispositions by the proprietor, other than a transfer of the "registered estate in the land, or part thereof, shall, subject to

" the provision relating to mortgages, be completed by registra- " tion in the same manner and with the same effect as provided " by this Act with respect to transfers of registered estates " and so on. Then section 20 (1) provides: " In the case of a free- " hold estate registered with an absolute title, a disposition of " the registered land, or of a legal estate therein, including a lease " thereof, for valuable consideration shall, when registered, con- " fer on the transferee or grantee an estate in fee simple . . . or " other legal estate expressed to be created in the land dealt " with "—I am only reading the relevant terms—" together with " all rights," etc., but " subject (*b*) . . . to the overriding interests, " if any, affecting the estate transferred or created, but free from " all other estates and interests whatsoever." Reference must also be made to section 26 in relation to charges but I need only point out that by that section charges by way of legal mortgage shall be completed by the registrar entering on the register the person in whose favour the charge is made. Apart from section 27 (3), it would appear therefore to be tolerably clear that the title of the purchaser or of the mortgagee as the case may be in the case of registered land is not perfected until registration, and that, when registration takes effect, it is subject to overriding interests which are anticipated by section 20, but more precisely defined by section 70.

Section 70 (1) provides: " All registered land shall . . . be " deemed to be subject to such of the following overriding " interests as may be for the time being subsisting in reference " thereto." Then paragraph (*g*) covers the case of the right of every person in actual occupation of land " save where inquiry is " made of such person and the rights are not disclosed." Apart from section 27 (3) I agree with the way in which Mr. Cross put it, that the effect of paragraph (*g*) is to make the case of registered land analogous to the case of non-registered land, and to apply to the former the same kind of principle as is found in *Hunt* v. *Luck* [7] and exemplified in *Green* v. *Rheinberg*.[8]

Turning to section 27, it is to be observed that the section is directed, at any rate at first sight, to procedure and form. In the first subsection it provided that " A registered charge " shall, unless made or taking effect by demise or subdemise," etc., " take effect as a charge by way of legal mortgage." Then subsection (2) provides: " Subject to the provisions of the Law " of Property Act, 1925, a registered charge may contain in the " case of freehold land, an express demise, and in the case of " leasehold land an express subdemise of the land to the creditor " for a term of years absolute, subject to a proviso for cesser on " redemption." Subsection (3) provides: " Any such demise or " subdemise or charge by way of legal mortgage shall take effect " from the date of the delivery of the deed containing the same, " but subject to the estate or interest of any person (other than

[7] [1902] 1 Ch. 428; 18 T.L.R. 265.

[8] 104 L.T. 149.

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" the proprietor of the land) whose estate or interest (whenever " created) is registered or noted on the register before the date " of registration of the charge."

The argument, as I follow it, appears to be: (1) that the time from which the mortgage shall take full effect must be treated as being the moment of the execution of the legal charge, which would put the legal estate in the chargee from that date; and (2) that the legal estate overrides all interests save those of persons whose estates or interests are registered or noted on the register. It seems to me that that cannot be right. If so, it would be inconsistent, so far as I can see, with the purpose and intention of the earlier sections to which I have already alluded, and which provide that until registration (in the case of a sale) the vendor remains the proprietor of the legal estate. I am unable to accept it that if the registered proprietor is to be treated as remaining the proprietor of the legal estate, a legal estate at the same time can also be created in favour of somebody else not on the register at all and not deriving title from someone on the register, although the earlier sections 19, 20 and 26 indicate that a charge is only completed by entry on the register.

The words " shall take effect " would be a very inept and oblique way of providing for the creation, retrospectively, of some legal interest. After all, the words " shall take effect " are found in the first subsection which says " A registered charge " shall . . . take effect as a charge by way of legal mortgage."

In my judgment, Danckwerts J. was right in the view he formed that the purpose of this provision is to negative the suggestion that, pending registration, the charge is wholly ineffective, because otherwise, being only by the terms of the earlier sections capable of being completed by registration, it might never be effective at all since at its date ex concessis the person granting the legal charge might not himself be on the register. The section indeed is a new section not re-enacted from any earlier statute. As the judge pointed out, the argument was a novel one not previously taken, and he did not think it was sound.[9] " I do " not think that the subsection is dealing with the matter of legal " estates or interests, but the form of a registered charge and is " simply designed to secure that the demise or subdemise (or the " equivalent rights in the case of a charge by way of legal mort- " gage) begin from the date when the charge is executed." Then he goes on to say: " In any case, the tenancies of the defendants " in possession began prior to the date of the execution of the " charge and so would, if not invalid, be effective against the " plaintiff company under section 20 (1) of the Act." I agree also with that. It would seem to me that it would be contrary to the whole tenor of the Act and indeed to general principle if, by reason of the reference in section 27 to estates or interests which are registered or noted on the register, you could produce

[9] [1958] Ch. 314, 323; [1958] 2 W.L.R. 200, 207.

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the result that the plaintiffs could defeat the interests of a tenant of which he had notice when he took possession. According to general principles (and indeed it has not been contested) the plaintiffs had or must be treated as having had notice of the occupation of Mrs. Hitchen and her companions since there they were in occupation for all to see.

In the result the position of the plaintiffs can be no better than the position of the Waites as against the tenants. I further concur with the judge in the view that the tenants had, as against the Waites at the relevant date, a right founded in contract, and that that was an interest in land which they were able to assert against the Waites and which entitled them to remain in occupation during the period in respect of which they had paid the stipulated rent in advance. I should say (and I meant to say in dealing with the Waites) that it is not in doubt that the £2 0s. 6d. was in truth the standard rent under the Rent Act and therefore the maximum charge by way of rent which thy could make and there is here no discount of the rent by the payment in advance. I have stated that the £315 18s. represents in fact 156 weekly payments. I have said that as against the tenants the Waites would have been estopped from saying that they were mere licensees, and, therefore, I think the same conclusion affects the plaintiffs. That result, in my opinion, is neither affected by the terms of the Land Registration Act, 1925, nor by any alleged illegality under the Rent Act of 1949.

As a consequence the judge rightly concluded the matter and this appeal should be dismissed.

ROMER L.J. I am in full agreement with the judgment which the Master of the Rolls has delivered and I do not desire to add anything of my own.

ORMEROD L.J. I also agree.

Appeal dismissed.

Solicitors: *A. Kramer & Co.; Humphrey Razzall & Co.*

B. A. B.

[CHANCERY DIVISION.]

In re EL SOMBRERO LTD.

1958
July 2.
Wynn-Parry J.

[No. 00536 of 1958.]

Company—Meeting—Jurisdiction of court to order—Annual general meeting—Failure of directors to hold—Application by shareholder to court to direct holding of meeting—Opposition by directors—"If for any reason it is impracticable to call a meeting of the company"—"Impracticable," meaning of—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 135 (1).

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El Sombrero Ltd., *In re.*

The applicant was the holder of 900 shares in a private company whose capital was £1,000 divided into 1,000 shares of £1 each. The two respondents who were at all material times the only directors of the company each held 50 shares. No general meeting of the company had ever been held and no annual return filed. The company's articles of association had adopted Part II, Table A in the First Schedule to the Companies Act, 1948, subject to the alteration that the quorum of general meetings should be two persons present in person or by proxy. The applicant by originating summons asked the court to make an order under section 135 (1) of the Companies Act, 1948,[1] directing the convening and holding of a meeting, which was opposed by the respondents.

On appeal from the registrar's refusal to make such an order:—

Held, (i) that the question raised by the word "impracticable" was merely whether in the particular circumstances of the case the desired meeting of the company could as a practical matter be conducted.

(ii) That on the true construction of section 135 there was nothing to prevent the court intervening in a proper case and where the application before it was opposed by other shareholders.

(iii) That the present case was eminently one in which the court ought to exercise its discretion because otherwise it would be depriving the applicant of his statutory right under section 184 (1) to remove the respondents as directors, and because the respondents had failed to perform their statutory duty to call an annual general meeting.

Motion.

The appellant, Harry Laubscher, on this motion asked that an order of Mr. Registrar Berkeley by which he refused to direct the convening and holding of a meeting of El Sombrero Ltd. under section 135 of the Companies Act, 1948, be discharged or varied by the court.

The company was incorporated on March 21, 1956, as a company limited by shares and had an authorized and issued share capital of £1,000 divided into 1,000 shares of £1 each. The applicant was the registered holder of 900 shares and each of the personal respondents was the registered holder of 50 shares. The respondents were already directors of the company when the applicant acquired his shares, and had remained directors. No general meeting of the company, including the first annual general meeting, had ever been held and no annual return had been filed. In July, 1956, when the applicant acquired his shares from former shareholders, the company's articles of association had adopted the regulations in Part II of Table A in the First Schedule to the Companies Act, 1948, subject to certain alterations providing, so far as is material to this case, that the quorum of general meetings of the company should be two members present in person or by

[1] Companies Act, 1948, s. 135 (1): "If for any reason it is impracticable "to call a meeting of a company "in any manner in which meetings of "that company may be called, or to "conduct the meeting of the company "in manner prescribed by the articles "or this Act, the court may, either "of its own motion or on the appli- "cation of any director of the com- "pany or of any member of the "company who would be entitled to "vote at the meeting, order a "meeting of the company to be "called, held and conducted in such "manner as the court thinks fit. . . ."

proxy and that, if within half an hour from the time appointed for a meeting the quorum should not be present, the meeting, if convened on the requisition of members, should be dissolved.

The applicant by originating summons under section 135 of the Companies Act, 1948, asked for an order that the personal respondents, as directors of the company, should forthwith call, hold and conduct (or alternatively that the court might convene) an extraordinary general meeting of the company for the purpose of considering and, if thought fit, passing certain resolutions (set out in the schedule to the summons) and for directions to be made that one member of the company present in person or by proxy should be deemed to constitute a quorum at such meeting. The respondents opposed the making of such an order. The companies registrar held that the court ought not to exercise its discretion by making an order under section 135 in the face of opposition. The applicant appealed.

Charles Russell Q.C. and *L. H. L. Cohen* for the applicant.
I. J. Lindner Q.C. and *Raymond Walton* for the personal respondents.

The following case was cited in argument: *Rayfield* v. *Hands.*[2]

WYNN-PARRY J. stated the facts and continued: The first point of law which arises involves the construction of section 135 (1) of the Companies Act, 1948, the examination being directed to consider the scope of the phrase "If for any reason it is impracticable "to call a meeting of a company in any manner in which meetings "of that company may be called, or to conduct the meeting of the "company in manner prescribed by the articles or this Act . . ." It is to be observed that the section opens with the words "If for any reason," and therefore it follows that the section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next words are ". . . it is impracticable to call a meeting of a company . . ." The question then arises, What is the scope of the word "impracticable"? It is conceded that the word "impracticable" is more limited than the word "impossible"; and it appears to me that the question necessarily raised by the introduction of that word "impracticable" is merely this: Examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held. Upon the face of the section there is no express limitation which would operate to give those words "is impracticable" any less meaning than that which I have stated, and I can find no good reason in the arguments which have been addressed to me on behalf of the respondents for qualifying in any way the force of that word "impracticable" or the interpretation which I have

[2] [1958] 2 W.L.R. 851; [1958] 2 All E.R. 194.

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placed upon it, and therefore upon that point I am in favour of the applicant.

It was contended that the court could not or ought not to direct a meeting under this section where there was, as there is here, opposition, and, indeed, strong opposition; and in the course of his judgment the registrar said: "So far as I am aware there "has never been a case where the court has made an order under "section 135 in the face of opposition of such an order. . . ." It will be observed that the registrar is careful not to go so far as to say as a conclusion that the court has no jurisdiction to make an order under the section in the face of opposition. There is nothing I can find in the language of the section which would even indicate that the jurisdiction can only be invoked if, at least, there is no opposition, and I hold that, on the true construction of the section, there is nothing to prevent the court intervening in a proper case and where the application before it is opposed by other shareholders.

It is interesting to see that the registrar, having made the observation which I have quoted as to the absence of any authority for the proposition that an order could be made under the section in face of opposition, goes on to say: ". . . and I do not "consider that under the circumstances of this case the court "ought to exercise its discretion by making such an order." What, as I read his judgment, really operated in his mind was this, that the two respondents had the power to prevent the desired meeting being held and, as he puts it in one passage of his judgment, having considered the Scottish case of *Edinburgh Workmen's Houses Improvement Co. Ltd.*,[1] "That case affords "me some guidance as to the meaning of 'impracticable' in "section 135 in relation to the quorum provisions of articles and "perhaps would justify me in holding that it is impracticable in "the circumstances of the present case to conduct a meeting of "the company in the manner prescribed by the articles for the "purpose of passing the resolutions mentioned in the schedule to "the originating summons since the personal respondents will see "to it that a quorum is never present at a meeting convened for "that purpose; but beyond that the case does not assist me for "it is clearly distinguishable from the facts of the present case "in that there the court made an order in relation to a public "company to enable resolutions to be passed which an over-"whelming majority of the shareholders in number and value "wanted passed, to which no member had expressed dissent and "in circumstances in which the three non-assenting shareholders "with their 48 shares would still have an opportunity, if so "minded, of coming before the court to express their views and "oppose any order which would render the resolutions effective. "Whereas in the present case I am asked to make an order in "relation to a private company at the request of one member

[1] 1935 S.C. 56.

" (the applicant) in the face of strenuous opposition from the " other two (the personal respondents) to enable the one to " remove the other two from their directorships, notwithstanding " that under the terms of the contract by which their respective " rights are governed the two respondents are entitled to prevent " the applicant from removing them at a meeting requisitioned " by him."

Later, referring to an argument which had been put before him by Mr. Cohen on behalf of the applicant, namely, that the applicant, as a majority shareholder, is entitled to remove the personal respondents from the board under section 184, and that the court would be stultifying the applicant's statutory powers if he refused to make the order which was asked for, the registrar said this: " I cannot accept that proposition as correct. His " power of removing a director under section 184 is limited to " doing so by ordinary resolution and under the terms of his " contract with the respondents they have power to prevent him " from passing such a resolution if they wish to do so. I do not " consider that the court ought to exercise its powers under " section 135 in such a way as to deprive the respondents against " their will of that power."

With all respect to the registrar, I think those passages proceed upon a misconception. It was conceded by Mr. Lindner, and, in my view, very properly conceded, that it was not possible to say that the respondents, by virtue of the articles, had such right as is implicit in the use of the word " entitled " by the registrar to prevent the applicant from holding and conducting the meeting. They have, it is true, a power to prevent him from doing so, but that power is not derived from the articles; it is derived from the accidental distribution of the shareholding in this company, and that, to my mind, explains the whole difficulty which has arisen.

I therefore arrive at this stage where I hold that I have jurisdiction in this case, and there is nothing to prevent me exercising the discretion which is given under the section if I choose to exercise it. It is true that I am sitting as an appellate court, but I am entitled to consider the question of discretion, because, in my view, as I have held, the registrar has misdirected himself on a question of law. In my judgment, this is eminently a case in which the court ought to exercise its discretion; first, because if the court were to refuse the application it would be depriving the applicant of a statutory right, which, through the company, he is entitled to exercise under section 184 (1), to remove the respondents as directors; secondly (and I think this is a proper matter to take into account as part of the reasons for deciding to exercise my discretion), the evidence disclosed that the respondents are failing to perform their statutory duty to call an annual general meeting. The period within which they should have held an annual general meeting expired at some date in October, 1957. Their excuse in the evidence is that there would be no use in

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convening and holding an annual general meeting, because the accounts for the first period of the company's history are not yet available. I have read the evidence with care, and I do not accept it as bona fide evidence. There is a clear statutory duty on the directors to call the meeting whether or not the accounts, the consideration of which is only one of the matters to be dealt with at an annual general meeting, are ready or not. It cannot possibly serve as an excuse for failing to perform that statutory duty. It is quite obvious that the only reason why the respondents refuse to call an annual general meeting is because the inevitable result of convening and holding that meeting would be that they would find that they had ceased to be directors. Reference was made to other proceedings between the parties and to a motion for the committal of the applicant for the alleged offence of endeavouring to procure that one of the respondents should not be present in court. It appears to me that I cannot properly take those other matters into account; I have no knowledge of them at all, and were I in any way to take them into account, I would be, at any rate to some extent, prejudging the issues between the parties one way or the other.

For these reasons, therefore, I propose to accede to this application and to direct a meeting of the company to be held under the power given me by section 135 of the Companies Act, 1948.

[After a discussion it was agreed that the order should direct that one member of the company present in person or by proxy should be deemed to constitute a quorum and that the meeting should be held at the offices of the applicant's solicitors.]

Order accordingly.

Solicitors: *Herbert Oppenheimer, Nathan and Vandyk; Callingham, Griffith & Bate.*

P. P.

[COURT OF APPEAL.]

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June 3, 4.

Jenkins, Parker and Pearce L.JJ.

OSTIME (INSPECTOR OF TAXES) *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY.

Revenue—Income tax—Double taxation relief—Life assurance—Mutual life assurance association in Australia—Branch office in United Kingdom — Assessments to income tax on life fund interest — Competence of assessments—"Industrial or commercial profits"—Whether taxable surpluses properly so described—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. I, Sched. D, rules applicable to Case III, r.* 3—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 430—*Double Taxation Relief* (*Taxes on Income*) (*Australia*) *Order,* 1947 (*S.R. & O.* 1947, *No.* 806), *Schedule, art. II* (1) (i), (3); *art. III* (2), (3).

The taxpayer, a mutual provident society with its head office in Australia, carried on life assurance business there and, through a

branch office in London, in the United Kingdom. For the years 1947–48 to 1953–54 inclusive it was assessed to United Kingdom income tax on sums which notionally were profits of its business of insurance, the assessments being made in respect of "life fund interest" under rule 3 of Case III of Schedule D to the Income Tax Act, 1918, and section 430 of the Income Tax Act, 1952.[1] The taxpayer appealed and the special commissioners

[1] Income Tax Act, 1918, Sch. I, Sch. D: "Case III. Tax in respect "of profits of an uncertain value and "of other income described in the "rules applicable to this Case . . . "r. 3: (1) Where an assurance com- "pany not having its head office in "the United Kingdom carries on life "assurance business through any "branch or agency in the United "Kingdom, any income of the com- "pany from the investments of its "life assurance fund (excluding the "annuity fund, if any), wherever "received, shall, to the extent pro- "vided in this rule, be deemed to be "profits comprised in this Schedule "and shall be charged under this "Case. (2) Such portion only of the "income from the investments of the "life assurance fund for the year "preceding the year of assessment "shall be so charged as bears the "same proportion to the total income "from those investments as the "amount of premiums received in "that year from policy holders resi- "dent in the United Kingdom and "from policy holders resident abroad "whose proposals were made to the "company at or through its office or "agency in the United Kingdom "bears to the total amount of the "premiums received by the company. ". . . (3) Every such charge shall be "made by the special commissioners "as though the company under the "provisions of this Act had required "the proceedings relating to the "charge to be had and taken before "those commissioners. (4) Where a "company has already been charged "to tax, by deduction or otherwise, "in respect of its life assurance "business, to an amount equal to or "exceeding the charge under this "rule, no further charge shall be "made under this rule, and where a "company has already been so "charged, but to a less amount, the "charge shall be proportionately "reduced."

Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, Sched., art. II: "(1) In the present "agreement, unless the context other- "wise requires . . . (f) the terms "'United Kingdom resident' and "'Australian resident' mean respec- "tively any person who is resident "in the United Kingdom for the "purposes of United Kingdom tax "and is not a resident of Australia "for the purposes of Australian tax "and any person who is a resident of "Australia for the purposes of "Australian tax and is not resident "in the United Kingdom for the "purposes of United Kingdom tax ". . . (h) the terms 'United King- "'dom enterprise' and 'Australian "'enterprise' mean respectively an "industrial or commercial enterprise "or undertaking carried on by a "United Kingdom resident and an in- "dustrial or commercial enterprise or "undertaking carried on by an Aus- "tralian resident; and the terms 'en- "'terprise of one of the territories' "and 'enterprise of the other terri- "'tory' mean a United Kingdom en- "terprise or an Australian enterprise, "as the context requires. (i) the term "'industrial or commercial enterprise "'or undertaking' includes an enter- "prise or undertaking engaged in . . . "the business of . . . insurance, "life insurance or dealing in invest- "ments, and the term 'industrial or "'commercial profits' includes profits "from such . . . business but does "not include income in the form of "dividends, interest, rents, royalties, "management charges, or remunera- "tion for personal services. . . . "(3) In the application of the pro- "visions of the present agreement by "one of the Contracting Govern- "ments any term not otherwise "defined shall, unless the context "otherwise requires, have the mean- "ing which it has under the laws of "that Contracting Government relat- "ing to the taxes which are the "subject of the present agreement."

Art. III (2): "The industrial or "commercial profits of an Australian "enterprise shall not be subject to "United Kingdom tax unless the "enterprise is engaged in trade or "business in the United Kingdom "through a permanent establishment "situated therein. If it is so "engaged, tax may be imposed on "those profits by the United King- "dom, but only on so much of them

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directed that the assessments be vacated. Their grounds were that (on the footing that article III of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, was capable of applying to notional profits of a mutual insurance society) profits attributable to the taxpayer's business in the United Kingdom were to be assessed under that article, and not under rule 3 of Case III of Schedule D, as there was a clear conflict between the Order and the rule and the Order must prevail; and that, the taxpayer being a mutual provident society, there were no industrial or commercial

" as is attributable to that permanent " establishment: Provided that " nothing in this paragraph shall " affect any provisions of the law of " the United Kingdom regarding the " imposition of excess profits tax and " national defence contribution in the " case of interconnected companies. " (3) Where an enterprise of one of " the territories is engaged in trade " or business in the other territory " through a permanent establishment " situated therein, there shall be " attributed to that permanent estab- " lishment the industrial or commer- " cial profits which it might be " expected to derive in that other " territory if it were an independent " enterprise engaged in the same or " similar activities and its dealings " with the enterprise of which it is a " permanent establishment were deal- " ings at arm's length with that " enterprise or an independent enter- " prise; and the profits so attributed " shall be deemed to be income " derived from sources in that other " territory. . . .

Income Tax Act, 1952, s. 430: " (1) Where an assurance company " not having its head office in the " United Kingdom carries on life " assurance business through any " branch or agency in the United " Kingdom, any income of the com- " pany from the investments of its " life assurance fund (excluding the " annuity fund, if any), wherever " received, shall, to the extent pro- " vided in this section, be deemed to " be profits comprised in Schedule D " and shall be charged under Case " III thereof. (2) Such portion only " of the income from the investments " of the life assurance fund for the " year preceding the year of assess- " ment shall be so charged as bears " the same proportion to the total " income from those investments as " the amount of premiums received in " that year from policy holders " resident in the United Kingdom " and from policy holders resident " abroad whose proposals were " made to the company at or " through its office or agency in the " United Kingdom bears to the total " amount of the premiums received " by the company: Provided that in " the case of an assurance company " having its head office in any part " of Her Majesty's dominions outside " the United Kingdom, in India or in " the Republic of Ireland, the Com- " missioners of Inland Revenue may, " by regulation, substitute some basis " other than that prescribed in this " subsection for the purpose of ascer- " taining the portion of the income " from investments to be so charged " as being income derived from busi- " ness carried on in the United " Kingdom. (3) Every such charge " shall be made by the Special Com- " missioners as though the company " had, under this Act, required the " proceedings relating to the charge " to be had and taken before those " Commissioners. (4) Where a com- " pany has already been charged to " tax, by deduction or otherwise, in " respect of its life assurance busi- " ness, to an amount equal to or " exceeding the charge under this " section, no further charge shall be " made thereunder, and where a " company has already been so " charged, but to a less amount, the " charge shall be proportionately " reduced. (5) Where, by virtue of " this section, an assurance company " is charged under Case III of " Schedule D on a proportion of the " income from the investments of its " life assurance fund or on a basis " substituted therefor, the relief " under section 425 of this Act in " respect of expenses of management " shall be calculated by reference to " a like proportion of its total " expenses of management for the " year, estimated according to the " provisions of this Part of this Act. " (6) Subsection (3) of section 131 of " this Act (which provides that in- " come chargeable under Case III of " Schedule D may in certain cases be " assessed and charged in one sum) " shall not apply to tax in respect of " income to which subsection (1) of " this section applies."

profits attributable to its London branch which were assessable to United Kingdom income tax.

The Crown contended on appeal that the taxpayer, being a mutual society, had no actual profits or sources of profit and that the order of 1947 did not deal with purely notional or conventional profits and, therefore, did not apply to the taxpayer. Upjohn J. affirmed the determination of the commissioners. On appeal:—

Held, dismissing the appeal, that the taxpayer's taxable surpluses were properly described as "industrial or commercial "profits" for the purposes of the Order of 1947, and the taxpayer was assessable in accordance with article III, paragraphs (2) and (3) of the Schedule to the Order and not under rule 3 of Case III.

Inland Revenue Commissioners v. *Australian Mutual Provident Society* [1947] A.C. 605; [1947] 1 All E.R. 600; 28 T.C. 388 applied.

Decision of Upjohn J. [1958] 2 W.L.R. 636; [1958] 1 All E.R. 305 affirmed.

APPEAL from Upjohn J.[2]

The Australian Mutual Provident Society which had its head office in Australia, carried on life assurance business there and, through a branch office in London.

The question which arose on this appeal was whether the sum of business profits for the years 1947–48 to 1953–54 inclusive arrived at by the calculation prescribed by rule 3 of Case III of Schedule D to the Income Tax Act, 1918, in respect of the five earlier years and section 430 of the Income Tax Act, 1952, in respect of the last two years was an industrial or commercial profit of an Australian enterprise, namely the taxpayer company, within the meaning of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947.

The special commissioners directed that the assessments be vacated. Their grounds were that (on the footing that article III of the Relief Order of 1947, was capable of applying to the notional profits of a mutual insurance society) profits attributable to the company's business in the United Kingdom were to be assessed under that article, and not under rule 3 of Case III of Schedule D, as there was a clear conflict between the Order and the rule and the Order must prevail; and that, the company being a mutual provident society, there were no industrial or commercial profits attributable to its London branch which were assessable to United Kingdom income tax.

The case stated on the appeal from the decision of the commissioners is sufficiently set out in the report below.[3]

On appeal by the Crown, Upjohn J. upheld the determination of the commissioners. The Crown appealed.

John Pennycuick Q.C. and *Alan Orr* for the Crown.

F. Heyworth Talbot Q.C. and *G. B. Graham* for the taxpayer.

The following cases, not referred to in the judgments, were

[2] [1958] 2 W.L.R. 636; [1958] 1 All E.R. 305.

[3] [1958] 2 W.L.R. 636.

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cited in argument: *Inglis* v. *Buttery*[4]; *Inland Revenue Commissioners* v. *Cornish Mutual Assurance Co. Ltd.*[5]; *New York Life Insurance Co.* v. *Styles.*[6]

JENKINS L.J. This is an appeal by the Crown from a judgment of Upjohn J. dated December 20, 1957, whereby he affirmed a determination of the special commissioners dated July 24, 1956, in favour of the present respondents, a company called Australian Mutual Provident Society. The case concerns the effect on the company's tax liability of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947.

The company, and this is important, is a mutual insurance company, which was incorporated in New South Wales in 1849 and is now regulated by certain later Australian statutes. The company has a branch office in London and carries on part of its business here.

I should next refer to some of the income tax provisions relating to insurance companies. Rule 15 of the rules applicable to Schedule D, Cases I and II, in the Income Tax Act, 1918, provides as follows by sub-rule (1): "Where an assurance company carries on life assurance business in conjunction with assurance business of any other class, the life assurance business of the company shall for the purposes of this Act be treated as a separate business from any other class of business carried on by the company."

Rule 3 of the rules applicable to Case III of Schedule D has an important bearing on this case. [His Lordship read it and continued:] These provisions are those contained in the Income Tax Act, 1918. There are seven years' assessments concerned in the case from 1947–48 to 1951–52. The Act of 1918 applies to the five earlier years and the Act of 1952 applies to the last two years. There is no material difference between the Act of 1918 and the Act of 1952 for the present purpose so that I can confine my references to the provisions in the Act of 1918.

The relevance of the fact that the company is a mutual insurance concern is this: it is well settled that a mutual insurance company is not liable to tax on its mutual insurance business on the ground that the surpluses arising arise from transactions by the members inter se which are not, for income tax purposes, regarded as a trade carried on by the company. Rule 3 of the rules applicable to Case III of Schedule D was introduced, in fact, in the year 1915 by the Finance Act of that year. As to the provisions of that rule, it was, I think, for some considerable time understood that the effect of it was to provide a mode of ascertaining the proportion of the investment income of the company concerned attributable to its business activities in this country and the method of calculation laid down is of a kind which one can

[4] (1878) 3 App.Cas. 552, 577.
[5] [1926] A.C. 281; 41 T.L.R. 70; 12 T.C. 841.
[6] (1889) 14 App.Cas. 381; 5 T.L.R. 621; 2 T.C. 460

readily understand as a rough and ready method of arriving at a fair proportion of that income.

The scheme was to take a sum arrived at by ascertaining the proportion of the premium income received in this country to the premium income received throughout the world. That proportion sum produced a figure which, as I have said, was long understood as representing simply a proportion of the income from investments corresponding to the proportion of the business done in the United Kingdom to the whole of the business done.

That view, however, was not accepted by the House of Lords in a case concerning this same company, *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*,[1] which came before the House of Lords early in 1947 judgment having been delivered on March 31, of that year. In that case the dispute was, as I understand it, of this nature: the company had amongst its investments certain investments which were exempt from income tax and the question was at what stage in the calculation prescribed by rule 3 of Case III of Schedule D allowance ought to be made for these tax-free investments.

The company contended, as I understand it, that the deduction ought to be made from the proportion of income found to be attributable to United Kingdom activities under the provisions of the rule, for it was said that only thus could the company be given the full benefit of the exemption; on the other hand, the Crown's view was that the tax-free investments should be deducted from the totality of investments before applying the calculation to them. The view of the company on this matter, I understand, prevailed in this court, but when the matter came before the House of Lords their Lordships took a radically different view.

This new way of looking at the matter was introduced into the case by an observation made by Viscount Simon in the course of the argument. He said[2]: "Why does the existence of exempted "income affect the application of rule 3? Does the mere fact "that it is included as an item in the computation of the profits "charged under rule 3 amount to charging it with tax? The real "question to be determined is whether, on the true construction "of the rule, there has been any error or mistake in the case of "this society which holds in its life assurance fund investments "exempt from income tax, and further what is the right decision "in view of the fact that the revenue has, in effect, made the "concession that the existence of the exempted income makes a "difference to the calculation."

In the course of his speech Viscount Simon said[3]: "Section "15 of the Finance Act, 1915, was, it would seem, aimed at "meeting this difficulty,"—that was the difficulty of taxing insurance companies situate as the respondent company in this case was, that is to say, foreign insurance companies with branches

[1] [1947] A.C. 605; [1947] 1 All E.R. 600.
[2] [1947] A.C. 605, 611.
[3] [1947] A.C. 605, 617.

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in this country—" and it did so by providing for a conventional " figure, which should be ' deemed to be profits,' comprised in " Schedule D, on which a non-resident life insurance company, " with a branch in the United Kingdom, would make a contribu- " tion to United Kingdom tax, however it arranged its invest- " ments. The provisions now contained in rule 3 of Case III call " for the use of certain factors in order to arrive at this conven- " tional figure, upon which such an assurance company as the " respondent society is required to pay tax in respect of the annual " profit of its life assurance business carried on in this country."

Then he said [4]: " In the application of rule 3, the thing to be " taxed is not, in whole or in part, exempted receipts, but is a " conventional or notional sum—calculated, it is true, by the use " of figures which might include the proceeds of exempted invest- " ments—but a sum ' deemed to be profits,' to be charged as " such, without any deduction save that provided for in sub- " rule 4."

Again he said [5]: " Once it is accepted that rule 3 of Case III " is not one which taxes income from investments, whether " exempted or not, but one which taxes a conventional sum cal- " culated as the rule directs, it becomes reasonably clear that the " sum to be taxed is not varied by inquiring whether one of the " elements in the calculation contains income from exempted " investments. If variation is required on this ground, it must " be provided by legislation."

Lord Wright said [6]: " The charge was a tax on the investment " income only as a machinery to tax the general profits of the " British business, and as a manner of measuring the charge by " an arbitrary figure derived from a percentage of the investment " income. In this connexion it was not material to distinguish " between exempted and unexempted income. All that was " needed was a yardstick."

There are other observations tending in the same direction elsewhere amongst their Lordships' speeches but I think those citations will show sufficiently the view they took which was, in effect, that the sum arrived at by applying the calculation provided for by rule 3 of Case III of Schedule D was not a figure conventionally arrived at to represent investment income received by the company and attributed to its activities in this country, but was a figure representing the profit derived by the company from its business in this country. It was conventionally arrived at or notionally arrived at (as it was put in one place by Lord Simon), but, when arrived at, it was an actual figure for tax purposes taken as representing for those purposes the profit arising from the company's business in this country.

It is noteworthy that their Lordships throughout their speeches made no reference at all to the circumstances that in as much as this was a mutual insurance company it was not taxable on the

[4] [1947] A.C. 605, 619.
[5] [1947] A.C. 605, 620.
[6] [1947] A.C. 605, 622.

profit of its insurance business as distinct from the income of its investments. If the sum so arrived at could be regarded as a figure of investment income conventionally ascertained there would actually be an end of this case, for it will be seen on reference to the Australian double taxation relief agreement that income from investments is excluded from its scope, so, on that view, the position would simply be that the company would be liable to tax on the figure arrived at by the calculation laid down in rule 3 as income from investments and would pay tax accordingly; but, as their Lordships left the matter, there can be no doubt that the figure arrived at under rule 3 must be regarded for tax purposes as being a figure representing business profits and nothing else. In that state of the law the order came into operation.

The agreement was signed on behalf of the government of this country and of the Commonwealth of Australia on October 29, 1946. The necessary steps to bring it into operation and give it statutory effect were taken as regards this country on April 23, 1947, and, no doubt, corresponding steps were taken by the Australian authorities at or about the same time. So that in March, 1947, when judgment was delivered by the House of Lords in the case to which I have referred, the agreement had, in fact, already been signed but had not yet been given statutory effect.

The agreement (one of many agreements of this character) was made under the provisions of section 51 of the Finance (No. 2) Act, 1945, which provided as follows: "(1) If His "Majesty by Order in Council declares that arrangements specified in the Order have been made with the Government of "any territory outside the United Kingdom with a view to "affording relief from double taxation in relation to income tax, "excess profits tax or the national defence contribution and "any taxes of a similar character imposed by the laws of that "territory, and that it is expedient that those arrangements "should have effect, then, subject to the provisions of this "Part of this Act, the arrangements shall, notwithstanding "anything in any enactment, have effect in relation to income "tax, excess profits tax and the national defence contribution "so far as they provide for relief from tax, or for charging "the income arising from sources in the United Kingdom to "persons not resident in the United Kingdom, determining the "income to be attributed to such persons and their agencies, "branches or establishments in the United Kingdom, or de-"termining the income to be attributed to persons resident in "the United Kingdom who have special relationships with "persons not so resident.

"(2) On the making of an Order in Council under this "section with respect to any arrangements relating to a "Dominion as defined for the purposes of section twenty-seven "of the Finance Act, 1920 (which provides for relief in respect "of Dominion income tax), the said section twenty-seven shall

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"cease to have effect as respects that Dominion except in so "far as the arrangements otherwise provide."

The important words to notice in that section are the words in subsection (1)—". . . then, subject to the provisions of this "Part of this Act, the arrangements shall, notwithstanding "anything in any enactment, have effect in relation to income "tax. . . ." It follows that if and so far as there is any inconsistency between rule 3 of the rules applicable to Case III of Schedule D, on the one hand, and the agreement, on the other hand, then the agreement, having duly been given statutory effect, must prevail over the rule.

I should next refer to some of the provisions of the agreement. It is scheduled to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, Statutory Rules and Orders 1947, No. 806. The body of the Order says, by paragraph 1, that it "may be cited as the Double Taxation Relief (Taxes "on Income) (Australia) Order, 1947," and, by paragraph 2: "It is hereby declared—(*a*) that the arrangements specified in "the agreement set out in the Schedule to this Order have "been made with the Government of Australia with a view "to affording relief from double taxation in relation to income "tax, excess profits tax or the national defence contribution "and taxes of a similar character imposed by the laws of "Australia; and (*b*) that it is expedient that those arrangements "should have effect."

The agreement is set out in the Schedule. [His Lordship referred to the relevant parts of articles II and III and continued]: There is nothing else to which I need refer until article XV which provides for the commencement of the agreement. The agreement is to have effect when all formalities are completed: "(*a*) in the United Kingdom, as respects in-"come tax for the year of assessment beginning on April 6, "1946, and subsequent years;"—and other provisions are made in regard to its having effect as to surtax; and "(*b*) in Australia, "as respects tax for the year of tax beginning on July 1, 1946, "and subsequent years."

The question in the case may be expressed as being whether the sum of business profits (as I have termed it) arrived at by the calculation prescribed by rule 3 of the rules applicable to Case III of Schedule D is an industrial or commercial profit of an Australian enterprise, namely, the respondent company, within the meaning of the Double Taxation Relief Agreement. If it is, then the result would appear to be that the company can claim to be assessed in accordance with the provisions of paragraphs (2) and (3) of the third article of the agreement and cannot properly be assessed to tax on the sum arrived at by the calculation prescribed by rule 3.

On the Crown's side it is contended that, although actual business profits are by definition "industrial or commercial

"profits" for the purposes of the double taxation relief agreement, the rule 3 sum of business profits has nothing whatever to do with the provisions of that agreement. It is, argues Mr. Pennycuick, a purely notional sum. It has no substratum of fact. It is not a sum arrived at by a conventional calculation but, when so arrived at, representing actual profit. It is a purely notional sum; and he contends that the agreement is concerned with actual profits; though they may be artificially estimated in accordance with income tax principles, actual profits there must be. He says that the true view is that the company's liability to tax under rule 3 of Case III on the sum of business profits arrived at by the rule 3 calculation is wholly outside the agreement and that the company remains liable to tax upon it.

In my view that contention should not be accepted. It appears to me that for the present purpose it does not greatly matter whether the sum of profit referred to in rule 3 is to be regarded as an actual or notional sum. The purport of the rule, as I understand the construction placed upon it by the House of Lords, is to impute to an establishment (operating here) of a foreign insurance company a sum representing the profits arising to that company from its life insurance business in the United Kingdom. That is the object of it and to carry out that object it applies the proportion formula. On the other hand, the agreement (which, as I have mentioned, must be taken to override the Act where the two conflict) provides in paragraph (3) of article III its own method of estimating and arriving at the profit arising to an Australian company (including an insurance company) from its business (including life insurance business) in the United Kingdom.

The system adopted in rule 3 is a rough and ready method of taking the proportion to which I have referred. The system prescribed by the agreement is of a far more elaborate and detailed character; but both, in the case here relevant of an Australian company carrying on life insurance business in this country, aim at the same object, which they seek to achieve by different means. It may be that the figures arrived at by applying one or other of the two formulae would be widely different, but, in my view, the agreement must prevail by the terms of the Act under which it was made.

It follows from that that for the purpose of assessing this company to tax for the years in question on the profits of its business in the United Kingdom one may completely ignore rule 3 and the figure arrived at by applying the calculation laid down in that rule. The company's liability is to be measured in accordance with the agreement and not otherwise.

What the effect of applying the agreement in substitution for rule 3 may be it is not for me to say. It may be that it will be found that the fact that this is a mutual society will result in the liability being reduced to nil; on the other

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hand, one can see that there might be room for argument to the effect that the various hypotheses postulated by paragraph (3) of article III of the agreement might, when applied, involve the assumption that the company was not a mutual company; but questions of that kind do not concern us at this stage and I would prefer to say nothing about them.

The case has been most elaborately argued. I have confined myself, in effect, to one aspect of it which appears to me to be decisive in favour of the company, but I intend no disrespect to the careful and elaborate argument presented. In the result I see no reason at all to disturb the concurrent views of the special commissioners and the judge and I would dismiss this appeal.

PARKER L.J. I agree. The short though difficult question in this case is whether the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, applies in the circumstances of this case. If it does not, then it is clear—and, indeed, it is conceded—that the seven assessments in this case, five made under rule 3 of Case III of the Income Tax Act of 1918 and two under section 430 of the Act of 1952, are valid assessments; if, on the other hand, it does apply, then, by virtue of section 51 of the Finance (No. 2) Act, 1945, the measure of liability under the Relief Order prevails and supersedes the liability under rule 3 of Case III and accordingly the seven assessments in question must be discharged.

The Relief Order in effect provides that none of the enterprises there referred to shall be taxed in the United Kingdom unless certain conditions are fulfilled. The first is that it must be an enterprise of the type laid down in the Relief Order and the Relief Order provides that one of the enterprises in question shall be one carrying on the business of life insurance; accordingly, albeit that the company in this case is a mutual society, it is clearly an enterprise within the Order. Secondly, that enterprise must have a permanent establishment in the United Kingdom and there is no doubt that this company had. The third condition is that what may be taxed are only profits from the activities or business of that enterprise not including income in the form of dividends, interest, etc. The sole question really in this case is whether the profits on which the company were assessed to tax are profits within that Relief Order.

I am afraid that for my part I am conscious of the inability fully to understand the decision of the House of Lords in *Inland Revenue Commissioners* v. *Australian Mutual Provident Society* [7] but, be that as it may, it is a decision clearly binding upon this court. As I understand it, their Lordships were there construing rule 3 of Case III as providing that a certain proportion of the

[7] [1947] A.C. 605.

investment income of such a company as this should be deemed to be the business profits of that company and that, be it observed, whether the company in question was a proprietary company or a mutual society as, indeed, was the case before the House of Lords.

If that be right, then, albeit that they were deemed to be business profits, it seems to me that those profits so deemed come within and come plainly within the words of the Relief Order. I would add this: that it does seem to me that, in so far as one can look at the surrounding circumstances and the intention of the parties, that must have been their intention. For more than forty years before the agreement incorporated in the Relief Order was made a foreign enterprise such as this was not taxed under Case I of Schedule D but under rule 3 of Case III.

As Lord Simon put it in the case in the House of Lords to which I have referred[8]: "It is true that the company might be "regarded as carrying on in this country a trade through its "branch, but there was much practical difficulty in arriving at "the figure under Case I of Schedule D of annual profits of such "a branch for, in the case of life assurance business, the true "profits attributable to the branch could not be ascertained in the "normal manner, as is shown by provisions in the Assurance "Companies Act, 1909, for a quinquennial valuation. Section 15 "of the Finance Act, 1915, was, it would seem, aimed at meeting "this difficulty, and it did so by providing for a conventional "figure, which should be 'deemed to be profits,' comprised in "Schedule D on which a non-resident life assurance company, "with a branch in the United Kingdom, would make a contribu-"tion to United Kingdom income tax, however it arranged its "investments. The provisions now contained in rule 3 of Case "III call for the use of certain factors in order to arrive at this "conventional figure, upon which such an assurance company "as the respondent society is required to pay tax in respect of the "annual profit of its life assurance business carried on in this "country."

That being so, it being the case that for some forty years taxation of a life insurance company under Case I of Schedule D was to all intents a dead letter, one arrives at this: That, if the Crown's argument is right, the inclusion in the Relief Order of an enterprise carrying on the business of life insurance would have been there for purely theoretical interest in that only theoretically and not practically did such a life insurance company earn actual trading profits liable to tax.

For these reasons and the reasons given by my Lord I will dismiss this appeal.

[8] [1947] A.C. 605, 617.

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PEARCE L.J. I agree with what my Lords have said and I have nothing to add.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor, Inland Revenue; Bell, Brodrick & Gray.*

J. A. G.

[CHANCERY DIVISION.]

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June 19, 20, 21, 24,
July 9.
Harman J.

JOSEPH *v.* NATIONAL MAGAZINE CO. LTD.

[1956 J. 5621.]

Author—Contract to publish article—Specific performance—Article to be written and printed under author's name—Stylistic and factual alterations by editor—Refusal by author to allow publication of revised article—Whether repudiation by author—Submission of alterations by author — Whether author entitled to specific performance.

In June, 1956, the plaintiff, who was an expert on jade, entered into a contract with the defendants whereby an article on jade to be written by him and to appear under his name was to be printed by the defendants in their magazine. On receipt of the plaintiff's article the editor of the defendants' magazine sent it for revision to a free-lance journalist who changed the title and conclusion and made considerable stylistic alterations and certain alterations of fact. The plaintiff refused to allow the article as revised to appear under his name and was unwilling to agree with the defendants' intention to print it with or without his name. Following completion of his original article the plaintiff had submitted certain alterations which he wanted made. In an action for specific performance of the contract and damages for breach of contract:—

Held, (i) that the plaintiff was amply justified in refusing to allow publication under his name of the article as revised and did not therefore repudiate the contract; (ii) that the court could not order specific performance of the contract because the exact terms of the article were never agreed between the parties, but the plaintiff was entitled to damages for breach of contract, as through the defendants' failure to publish the article he had lost an opportunity of enhancing his reputation as an expert on jade.

ACTION.

In this action the plaintiff claimed specific performance of a contract made between him and the defendants, and damages for breach of contract.

The facts are taken from the judgment.

The plaintiff, Louis Joseph, was a dealer in antiques, carrying on business at 28, Knightsbridge. He made a speciality of jade carvings, in which he had been interested all his life, his father having been engaged in the like trade before him. He was a considerable authority on this subject, having talked on it on the

television, but he had never written about it. The defendants' magazine "The Connoisseur" was founded in 1901 and occupied a prominent position in its own line. It published nine numbers a year, priced at 10s. in England and two dollars in the United States, and was an elaborate production, the advertising part being about equal to the editorial part, the illustrations in both being of much the same kind and quality. It appeared from the evidence that all the prominent London art dealers advertised in this publication and that to take a page might cost £100, in addition to the cost of the block for producing the illustration. The plaintiff had from time to time so advertised his wares. The defendants' advertising manager, one Law, was well acquainted with the plaintiff and was in his shop about the end of June, 1956, trying to sell advertising space. The plaintiff had recently acquired two green jade plaques which he showed to Law, who tried to persuade him to advertise them with a coloured illustration, which would have cost the plaintiff about £175. The plaintiff did not accept this and inquired whether he could not have his illustration in the editorial part of the magazine. At this point there was a conflict of evidence between the plaintiff and Law, the former saying that Law offered to insert his illustration in the editorial part of the magazine and to procure him what he called a "write-up" by the editor in addition, based on material to be supplied by the plaintiff, at a cost to him of under £100 for the preparation of the necessary photograph and block. Law, however, said that this offer was made on the next day and was agreed to by the plaintiff, and this was in effect the contract alleged in the defence. The plaintiff agreed that there was a second interview on the following day but said that at this interview he refused Law's offer of an editorial write-up which had already been made to him on the day before, but accepted an offer by Law that the proposed illustration should occupy one page in the editorial part of the magazine and should be faced on the other page by a full-page article to be written by the plaintiff and appear under his signature.

On September 1 the plaintiff received the following letter from one Ramsey, the editor of the magazine: "Dear Mr. Joseph, I "believe that you are now nearly ready with the text in reference "to your jade screen. I can use up to 500 words—at some time "within the next two weeks please." This surprised the plaintiff, who had been told that the full-page article would run to at least a thousand words, and he rang up Ramsey on September 3. The plaintiff said that he explained what the bargain was, namely, that he should have a signed article of a thousand words. He said that Ramsey expressed surprise that this was the bargain made, but eventually agreed. His Lordship found that there was a bargain made in June, as the plaintiff said, between himself and Law, and ratified by Ramsey in September.

By September 17 the plaintiff had written his article and gave it to Law, who took it to Ramsey. The plaintiff, however,

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had second thoughts, and on September 18 he asked for his first version to be destroyed and supplied a new one. It was at this time intended that the article should appear in the October issue, but this intention was changed to November. On receipt of the second article Ramsey, who did not like its style, sent it to a journalist called Staal for revision. He was a free-lance journalist writing about art objects and having some knowledge of jade, but no pretensions to be an expert. He returned the article on September 23 to Ramsey with the following covering letter: "Dear Gwynne, Herewith the revised jade article, which "I hope you will think an improvement on the original. I have "not changed the general plan, but have translated it from "Knightsbridge-ese into tolerable English, and have excised as "many errors of fact as I could find." On September 26 the plaintiff again became dissatisfied with his second attempt and produced a third. This had small corrections of fact or opinion and it was never considered by Ramsey, who (as his Lordship held) was not bound to consider it, having already started to deal with the article of September 18. On October 15 Ramsey sent to the plaintiff, set up in print in the form in which it would appear in the magazine, the article revised by Staal. The covering letter was in these terms: "I enclose herewith a proof of "your jade article, which I have adjusted in certain places, and "would be much obliged if you could arrange for this to be "returned within the course of a post or two." This was a shock to the plaintiff and he at once wrote the following letter: As "soon as I received a proof this afternoon sent under cover of "your letter of even date, I unsuccessfully tried to contact you "by telephone. You seem to have ignored my manuscript sent "to you on September 26 which corrected the one sent on "September 18. The article as you have re-written it includes "twenty-three errors of fact and technical errors which were in "neither of my manuscripts. You will therefore appreciate that, "apart from the point that the altered title and text have taken "away my theme, I cannot allow my name to appear under the "article in its present form. Further, I am not agreeable to the "publication of an article based on my article without my name, "as this inclusion was an essential part of our arrangement." Either Ramsey on this occasion or Law on his behalf a day or so later informed the plaintiff that the defendants intended to publish Staal's revision either with the plaintiff's name on it or without. The plaintiff was unwilling to agree to either of these courses and it was said that this constituted a repudiation of the agreement which released the defendants from liability.

On November 17, the plaintiff issued a writ claiming specific performance of the contract, which by his statement of claim he alleged was concluded between himself and Law, on behalf of the defendants, in June, 1956, and damages for breach of contract. By their defence the defendants alleged that the plaintiff

had repudiated the contract, and counterclaimed to recover the expense of making certain blocks to illustrate the article.

F. E. Skone James for the plaintiff.
R. W. Goff Q.C. and *G. M. Parbury* for the defendants.

The case cited in argument is referred to in the judgment.

Cur. adv. vult.

July 9. HARMAN J. read the following judgment. [His Lordship stated the facts and his findings and continued:] In my judgment there was a contract made by Law with the plaintiff at the end of June and ratified by Ramsey at the beginning of September that a full-page illustration in colour of the plaintiff's plaques should appear in the editorial part of the magazine and that opposite should be a full-page article written and signed by the plaintiff. Now it appears that a page of "The Connoisseur" takes about a thousand words. The article tendered by the plaintiff contained some 1,220 words, and the plaintiff admits that it was within the competence of the editor to curtail the article so as to go onto a page. What the plaintiff denies is the defendants' right to have revisions made such as were here made by Ramsey and Staal, these including the title and the conclusion, a number of alterations of fact and, above all, stylistic alterations. In my judgment, the plaintiff was amply justified in refusing to allow to be published under his name and as his work the article as revised by Staal. I can see no justification for the contention that an editor may alter the matter and the manner of a signed article in this way. Style is, I suppose, a matter of taste. Ramsey said that the plaintiff's article was not in "The "Connoisseur" manner and he preferred Staal's production. For myself, I think it was greatly inferior, being written in the kind of journalese which alters the words "before burial" to "prior "to interment." However that may be, the plaintiff was entitled to write his own article in his own style, expressing his own opinions, and was not bound to submit to have his name published as the author of a different article expressing other opinions in a different style. In my judgment, therefore, the plaintiff did not repudiate the contract. It is true the plaintiff is not a professional writer and that it was his reputation as a connoisseur in jade which he wished to enhance; but, having regard to the contract made, he was entitled to do this in his own way.

It remains to consider what remedy the plaintiff is entitled to have. He claims specific performance, but it is not his wish to have the article of September 18 (the second version) published as it stands but to have it published with the small corrections included in the third version, that of September 26, so that there never was an agreed subject-matter for publication. The plaintiff

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sought to pray in aid *Barrow* v. *Chappell & Company*,[1] in which specific performance was decreed for the publication of a piece of music, but in that case the music had been composed and performed on more than one occasion before the agreement was made and the defendants offered in court to publish the music if the judge found there was a contract. This is a very different case. There never was, as I pointed out, a specific article which the defendants agreed to publish. The defendants argued that there was no mutuality because at the time that the contract was made the subject-matter of the contract was not in existence and the defendants could not have compelled the plaintiff to write the article. As to this, I am of opinion that it is not essential that the subject-matter of the contract should be in the plaintiff's possession or power when the contract is made. It is enough if he is able to produce it before the date when performance is due. This at least is true of a chattel. But in this case the exact terms of the article were never agreed on between the parties, and the court would be called on to supervise the editing of the article, whether that of September 18 or 26, by any necessary curtailment or correction of mistakes or possibly grammatical changes which an editor may legitimately make. In my judgment, therefore, this is not an agreement of which specific performance can be ordered by the court.

There remains the question of damages. As to this, the defendants argue that publicity being all that the plaintiff sought, he could have had all the publicity he wanted if he had agreed to Staal's article going out under his name, and therefore nominal damages only can be awarded. I do not accept this. The plaintiff's object was not to advertise his plaques but to enhance his own reputation as an expert in jade, and this, as I have said, he was entitled to do within reasonable limits in his own way. Indeed, I cannot but think that he was justified in his notion that Staal's article published under his name would not be a help to him but the reverse. The quantum of damage in such a case is and must remain more or less a matter of guesswork. It would undoubtedly be a feather in the plaintiff's cap to have a signed article published in the editorial pages of this magazine. He has lost that advantage. The measure of damage is not susceptible of accurate assessment. I see no object in sending the question to inquiry, for I do not think that any evidence would help towards quantifying it. In the absence of a jury, I must do the best I can, and I assess the damages at £200, for which sum there will be judgment for the plaintiff. In addition, he is entitled as special damage to the amount he expended on having the photograph taken, which was 15 guineas.

As to the counterclaim, the defendants, in accordance with the contract, had the blocks made for the purpose of illustrating the plaques, and this cost £57 0s. 9d., and it is argued that this

[1] Danckwerts J. 1951 unreported.

sum must be set off against the damage awarded to the plaintiff. In my judgment this is not so. The plaintiff's promise to defray this expense was conditional upon the illustration appearing in the magazine with his name attached to it. Owing to the defendants' breach of contract, this has not come about. If the plaintiff had paid for the production of the blocks, he could, in my judgment, have recovered that sum in addition to the cost of the photograph. As he has not been put to this expense, he cannot recover it; but, in my judgment, neither can the defendants. I dismiss the counterclaim with costs.

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Judgment for the plaintiff.

Solicitors: *Drury, Hopgood & Co.; Frederick Wills & Co.*

P. P.

[QUEEN'S BENCH DIVISION.]

GREEN *v.* RUSSELL. McCARTHY (THIRD PARTY).

[X 1956 G. No. 97.]

1958
July 1, 2, 3, 11.

Ashworth J.

Fatal Accidents Acts — Damages — Insurance — Payment to employer under personal accident group insurance policy — Employer "absolute owner" of policy—Employer's payment to deceased employee's dependant—Whether payment to be taken into account in assessing damages—Fatal Accidents (Damages) Act, 1908 (8 *Edw.* 7, *c.* 7), *s.* 1.

By section 1 of the Fatal Accidents (Damages) Act, 1908: "In "assessing damages in any action . . . under the Fatal Accidents "Act, 1846 . . . there shall not be taken into account any sum "paid or payable on the death of the deceased under any contract "of assurance or insurance . . ."

In 1951 an employer took out a personal accident group insurance policy which, after reciting "Whereas the insured is "desirous of securing payment of benefits as hereinafter set forth "to any insured person," provided that "if . . . any insured "person shall sustain bodily injury" resulting in death, the insurance company should pay a specified sum, and that "the "company shall be entitled to treat the insured as the absolute "owner of this policy and shall not be bound to recognize any "equitable or other claim to or in the policy and the receipt of "the insured . . . alone shall be an effectual discharge." The policy described the employers as the "insured" and named as the "insured persons" certain of his employees. Those employees knew of the existence of the policy but it formed no part of the terms of their employment nor did the employer undertake any obligation to maintain or renew the policy. In 1955 one of the employees named as an "insured person" died in a fire which occurred on the employer's premises. The employee's mother brought an action under the Fatal Accidents Acts in which liability was admitted and damages were agreed at £1,300. On the question

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whether a sum of £1,000 paid under the policy by the insurance company in respect of the death to the employer's solicitors and paid or about to be paid by them to the employee's mother was a benefit arising out of the death which should be taken into account and deducted from the agreed damages:—

Held, that the expression "paid or payable on the death of "the deceased under any contract of . . . insurance" in section 1 of the Fatal Accidents (Damages) Act, 1908, was descriptive of the sum itself and did not involve by implication the corollary that the sum must be paid or payable to the deceased under the contract of insurance; and that, therefore, the sum of £1,000 fell within the scope of section 1 and should not be subtracted from the agreed amount of damages.

Bowskill v. *Dawson* (*No.* 2) [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649 considered.

Held, further, that the language of the policy and the evidence was insufficient to justify an allegation that the employer was a trustee of sums payable under the policy.

Bowskill v. *Dawson* (*supra*) and *Prudential Staff Union* v. *Hall* [1947] K.B. 685; 63 T.L.R. 392 distinguished.

ACTION.

The plaintiff, Florence Green, a widow, suing on her own behalf and as the administratrix of the estate of her son, Alfred Edward Green, claimed damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, in respect of the death of her son on June 6, 1955, in a fire which occurred in the premises where he was employed, against the defendant, Sarah Anne Russell, the administratrix of the estate of his employer, Arthur Henry Russell, who also died in the fire.

In 1951 the employer had taken out a Personal Accident Group Policy issued by the Yorkshire Insurance Company Ltd., which, after reciting that "Whereas the insured is desirous of "securing payment of benefits as hereinafter set forth to any "insured person in the event of his sustaining accidental bodily "injury as hereinafter provided . . . and has paid or agreed to "pay the premium as consideration for such insurance . . ." provided that "If at any time during the currency of this policy "any insured person shall sustain bodily injury . . . and such "injury shall . . . Section A.—Result in death the company "shall pay the sum insured stated in section A in the schedule." By condition 5 of the policy: "The company shall be entitled "to treat the insured as the absolute owner of this policy and "shall not be bound to recognise any equitable or other claim "to or interest in the policy and the receipt of the insured or "the insured's legal representative alone shall be an effectual "discharge." By condition 8: "The due observance and ful-"filment of the terms conditions and endorsements of the policy "in so far as they relate to anything done or complied with "by the insured or any insured person . . . shall be conditions "precedent to any liability of the company to make any pay-"ment under this policy." The schedule to the policy set out

as "insured Arthur H. Russell" while under the heading "insured persons" there were listed the names of certain of his employees, among them that of the plaintiff's son, and the sum set out opposite his name in section A was £1,000. The terms of employment of the plaintiff's son did not include any provision in regard to the policy and, although the existence of the policy was known to the employees named therein in such a manner as to create in their minds a reasonable expectation of benefit for themselves or their dependants in the event of their being injured or killed, that did not affect their attitude to their employment so as to cause them, in consideration of those possible benefits, to refrain from giving notice or asking for an increase in salary, nor did the employer undertake an obligation to maintain or renew the policy. The insurance company duly paid £1,000 in respect of the death of the plaintiff's son to the defendant's solicitors, who paid, or were about to pay, that sum to the plaintiff.

The defendant admitted liability in the action and damages were agreed at £1,300, subject to the issue, which was the only issue before the court, of whether the £1,000 paid by the insurance company should be taken into account and deducted from the agreed figure of damages as representing a benefit arising out of the death of the plaintiff's son, or whether it was a sum "paid or payable" on the death of the son under "any contract of assurance or insurance" within the meaning of section 1 of the Fatal Accidents (Damages) Act, 1908,[1] and as such should not be taken into account.

Marven Everett, Q.C., and *John Ritchie* for the plaintiff.

M. V. Dunbar Van Oss for the defendants.

The following cases were referred to in argument: *Davies* v. *Powell Duffryn Associated Collieries (No. 2)*[2]; *Tweddle* v. *Atkinson*[3]; *Bowskill* v. *Dawson (No. 2)*[4]; *Peacock* v. *Amusement Equipment Co. Ltd.*[5]; *Waters* v. *Monarch Fire and Life Assurance Co.*[6]; *Prudential Staff Union* v. *Hall*[7]; *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt*[8]; *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board*[9]; *Pyrene Company Ltd.* v.

[1] Fatal Accidents (Damages) Act, 1908, s. 1: "In assessing damages "in any action . . . under the Fatal "Accidents Act, 1846, as amended by "any subsequent enactment, there "shall not be taken into account any "sum paid or payable on the death "of the deceased under any contract "of assurance or insurance . . ."

[2] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657.

[3] (1861) 1 B. & S. 393.

[4] [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649.

[5] [1954] 2 Q.B. 347; [1954] 3 W.L.R. 288; [1954] 2 All E.R. 689.

[6] (1856) 5 E. & Bl. 870.

[7] [1947] K.B. 685; 63 T.L.R. 392.

[8] [1954] 1 Q.B. 250; [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1475.

[9] [1949] 2 K.B. 500; sub nom. *Smith* v. *River Douglas Catchment Board* 65 T.L.R. 628; [1949] 2 All E.R. 179.

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Scindia Navigation Co. Ltd.[10]; *In re Schebsman*[11]; *Hill* v. *Hill*[12]; *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*[13]; *Woods* v. *Woods*[14]; *Tomlinson* v. *Gill*[15]; *O'Neill* v. *S. J. Smith & Co. (Bidford) Ltd.*[16]; and *In re Williams.*[17]

ASHWORTH J. I shall reserve my judgment because, and only because, counsel in the next case have been waiting for some time.

July 11. ASHWORTH J. read the following judgment. This action arises out of the death, on June 6, 1955, of Alfred Edward Green, the plaintiff, Florence Green, being his mother. The defendant is the widow of Arthur Henry Russell, who died on the same day and who was Green's employer. The cause of death was a disastrous fire which occurred in the premises where both men worked, but as liability is admitted, it is unnecessary to consider further the circumstances surrounding the tragedy. Nor do I need to do more than mention the fact that third party proceedings were taken, since those proceedings were settled out of court.

Subject to the issue which has been argued before me, the damages to be awarded to the plaintiff were agreed at a figure of £1,300. That issue raises the question whether a sum of £1,000, which has been or is about to be paid to the plaintiff, should be deducted from the agreed figure on the ground that it represents a benefit arising out of the death of Green which must be set off against the loss which the plaintiff sustained by reason of his death. For the plaintiff it is contended that the sum of £1,000 should not be deducted, in that it falls directly within the provisions of section 1 of the Fatal Accidents (Damages) Act, 1908, as being a sum paid on the death of the deceased under a contract of insurance.

Russell was an architect employing a small number of men, of whom Green was one. In the year 1951 he decided to enter into a form of insurance in respect of some at least of his employees, and submitted to the Yorkshire Insurance Company Ltd. a proposal dated September 25, 1951. I do not think that anything turns on the wording of this proposal, but the policy which was issued as a result is of considerable importance. It is described as being a Personal Accident Group Policy and it starts with a recital in the following terms: "Whereas the "insured is desirous of securing payment of benefits as herein- "after set forth to any insured person in the event of his "sustaining accidental bodily injury as hereinafter provided. . . ." It is clear from the schedule on the back of the policy that

[10] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.
[11] [1944] Ch. 83; 60 T.L.R. 128; [1943] 2 All E.R. 768.
[12] [1897] 1 Q.B. 483; 13 T.L.R. 227.
[13] [1933] A.C. 70; 49 T.L.R. 90.
[14] (1836) 1 My. & C. 401.
[15] (1756) Ambler 330.
[16] [1957] 1 W.L.R. 1204; [1957] 3 All E.R. 255.
[17] [1897] 2 Ch. 12.

"the insured" meant the employer Russell and that "insured "persons" were the persons whose names were listed in the schedule, namely, his employees. By some mischance Green's name did not appear in the original list, but it is accepted that he was at some time included in the list of insured persons, and indeed there is attached to the policy an indorsement by which his name was deleted with effect from his death in June, 1955.

Following the recital, the policy provided that if any insured person should sustain bodily injury resulting in death, the company would pay the sum insured stated against section A in the schedule, in this instance £1,000. It is to be noted that this provision does not in terms state to whom the payment is to be made, but the fifth condition makes the position clearer: "The company shall be entitled to treat the insured as the "absolute owner of this policy and shall not be bound to "recognize any equitable or other claim to or interest in the "policy, and the receipt of the insured or the insured's legal "representative alone shall be an effectual discharge." It is common ground between the parties that the Yorkshire Insurance Company have paid £1,000 in respect of Green's death to the defendant's solicitors and that they have paid over part of that sum to the plaintiff and are in process of paying over the balance.

The plaintiff's case before me was closed without any oral or documentary evidence being tendered for the purpose of showing that under the terms of their employment Russell's employees acquired any contractual rights against him in respect of the policy or indeed that they were aware of its existence. After Mr. Van Oss had begun his argument for the defendant application was made on behalf of the plaintiff to call two witnesses who were at the material time in Russell's employment. Not without some hesitation and in spite of objection by Mr. Van Oss, I acceded to the application, and the witnesses Biggs and Warwick were accordingly called. As a result of their evidence it is, to my mind, plain that the terms of their employment did not include any provision in regard to the policy. There was nothing in those terms which resembled the provisions contained in the booklet issued by the employers in *Bowskill* v. *Dawson (No. 2)*.[1] On the other hand, I think that the existence of the policy was known to the employees in such a manner as to create in their minds a reasonable expectation of benefit for themselves or their dependants in the event of their being injured or killed. I should perhaps add in view of a point taken in the course of the argument in reply to Mr. Van Oss, that I can find nothing which would justify the inference that the possibility of benefit under the policy affected the employees' attitude in regard to their employment; there was nothing to show that they refrained from giving notice

[1] [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649.

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or from asking for an increase in salary in consideration of the benefit which might come to them from the policy, nor was there anything to show that Russell undertook an obligation to maintain or renew the policy.

The argument on behalf of the plaintiff may be summarized as follows. In the first place it was said that, in order to take advantage of what Lord Wright [2] called the relaxation afforded by the Act of 1908, a plaintiff is not called upon to establish that there was any enforceable right, legal or equitable, in the deceased or his personal representatives to claim the sum in question. All that has to be established is that the sum in question was a sum paid or payable on the death of the deceased under any contract of assurance or insurance. In the second place, and by way of alternative, it was said that on the facts of the present case the employer Russell constituted himself a trustee of sums payable under the policy and that an employee or his personal representative could enforce in equity performance of that trust. In the third place, it was said that inasmuch as the sums payable under the policy were in the light of the recital paid for the benefit of (inter alios) Green, he or his personal representatives had a right at common law to claim the sums even though he was not a party to the contract.

The first of these submissions involves the problem which the Court of Appeal in *Bowskill* v. *Dawson (No. 2)* [3] expressly refrained from deciding. Romer L.J. said [4]: "If the employees "who were within the scheme had no rights under it at all, "but merely an expectation of benefit depending wholly on the "volition and goodwill of their employers, it could, I suppose, "be contended (and I express no concluded opinion upon the "validity of the contention) that such sums as their dependants "might receive were mere bonuses, and that the fact that they "originated from a policy effected by the employers was merely "a fortuitous and irrelevant consideration." If I may say so, that supposition was right, since the contention envisaged by him was one of the main points in Mr. Van Oss's argument for the defendant. The reason why the Court of Appeal were free in that case to reserve the problem for future consideration was the existence of a scheme under which employees obtained rights, enforceable in equity, to receive sums paid under a policy of insurance. For reasons which will appear later, no such way of escape is open to me.

The principle has for long been established that in assessing a claim under the Fatal Accidents Acts both the loss and the gain to the dependants arising from the death must be taken into account. If the gain arises by way of legal right, there is plenty of authority for saying that it must be taken into account, and I need only cite on this point two sentences from

[2] In *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601, 612; 58 T.L.R. 240; [1942] 1 All E.R. 657.

[3] [1955] 1 Q.B. 13.

[4] Ibid. 26.

the judgment of Scrutton L.J. in *Baker* v. *Dalgleish Steam Shipping Co.*[5]: "On the other hand, as the question is what is "her pecuniary loss by the death, any pecuniary advantage she "has received from the death must be set off against her probable "loss. This is clear if she received such advantage as of legal "right." If the gain arises by way of a right enforceable in equity, the decision in *Bowskill* v. *Dawson* (*No. 2*)[6] is authority for saying that it must be taken into account.

The third type of gain is gain to which neither the deceased nor his representatives have any claim enforceable in law or in equity, but in respect of which it may be said that there was a probability or reasonable expectation that it would be received. An example of this type is to be found in *Baker* v. *Dalgleish Steam Shipping Co.*[7] and the Court of Appeal held that the gain, which took the form of a pension from the Crown, should be taken into account. A fourth type of gain is such as arises purely and simply from the generosity or goodwill of the donor, there being no reason at the date of the death to expect it to arise. Such a case was considered by the Court of Appeal in *Peacock* v. *Amusement Equipment Co. Ltd.*[8] in which it was held that such gain should not be taken into account.

Section 1 of the Act of 1908 is in the following terms: "In assessing damages in any action, whether commenced "before or after the passing of this Act, under the Fatal Acci- "dents Act, 1846, as amended by any subsequent enactment, "there shall not be taken into account any sum paid or payable "on the death of the deceased under any contract of assurance "or insurance, whether made before or after the passing of this "Act." Until the Act was passed, money paid under a life policy on the life of the deceased would have to be taken into account, and it may be supposed that one at least of the objects of the Act was to relieve dependants of the hardship of having compensation reduced by reason of the deceased's own thrift. But the language of the section is wide and, as Romer L.J. said,[9] it leaves something to the imagination.

One of the points put forward on behalf of the defendant was that section 1 constitutes, so to speak, a statutory exception to the general rule that gains must be taken into account, and accordingly that the burden was on the plaintiff to bring herself within the ambit of the section. On this basis it was further said that the language of the section ought not to be strained or given a wider interpretation than it could properly bear, even if the result bore hardly on the plaintiff. Assuming that the foregoing is the correct approach, there is still, in my judgment, a major difficulty in the defendant's way, namely, the absence of any

[5] [1922] 1 K.B. 361, 372; 38 T.L.R. 245.
[6] [1955] 1 Q.B. 13.
[7] [1922] 1 K.B. 361.
[8] [1954] 2 Q.B. 347; [1954] 3 W.L.R. 288; [1954] 2 All E.R. 689.
[9] [1955] 1 Q.B. 13, 24.

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words of limitation in the section. As it seems to me, there is no need to strain the language in order to give effect to the plaintiff's claim; on the other hand, to give effect to the defendant's argument involves the notional inclusion in the section of words of limitation restricting the scope of the section to cases in which the deceased or his representatives had some enforceable right to the sum in question. It would not be enough, having regard to the decision in *Bowskill* v. *Dawson* (*No.* 2),[10] to imply a provision that the contract of assurance or insurance must have been made by the deceased or on his behalf: words would be required to cover policies entered into or held in trust for the deceased. No doubt apt words could be selected for this purpose, but the plain fact is that they are not in the section now.

Emphasis was also laid on the fact that the section excludes a sum paid "under" a contract of insurance, and it was said that the sum of £1,000 paid to the plaintiff was not so paid, but was paid under a sense of moral obligation on the part of the defendant. In other words, to quote again from Romer L.J. in *Bowskill* v. *Dawson* (*No.* 2),[11] the effect and force of the contract of insurance was exhausted when the sum in question was paid by the Yorkshire Insurance Company to the defendant. Although I appreciate that the problem now under consideration was left undecided by the Court of Appeal, it seems to me that this particular argument, if sound, would have been upheld in that case. In my judgment, the expression "paid or payable on the death "of the deceased under any contract of . . . insurance" is descriptive of the sum itself and does not involve by implication the corollary that the sum was paid or payable to the deceased under the contract of insurance. Moreover, I think that force is lent to this view by the double use of the word "any": any sum, any contract of insurance.

It is perhaps worth mentioning that in cases where the sum in question originates in a contract of insurance, the dependants only require the assistance of the Act of 1908 if the resulting gain falls within the first three of the types of gain referred to above. If there was no probability or reasonable expectation that the sum would be received, the dependants would not be required to bring it into account. If, for example, an employer, anxious to guard against loss to himself by the accidental death of a skilled employee, takes out a policy of insurance but does not tell the employee or lead anyone to suppose that benefit may arise therefrom to the employee or his dependants, and then on the accidental death of the employee through the negligence of a third party decides, from motives of generosity, to pay the sum in question to the employee's widow, the third party could not contend that she should bring it into account in her claim against him. But she would primarily rely on the principle applied in

[10] [1955] 1 Q.B. 13. [11] Ibid. 26.

Peacock's case [12] rather than the Act of 1908 to protect herself from reduction in compensation.

It is conceded by the defendant that the first two types of gain referred to above are within the Act of 1908, and in my judgment it would have been a simple matter to include words limiting the scope of section 1 to those two types, if that was Parliament's intention. On the other hand, if the intention was to include the first three types, there is no necessity to add to the language actually used.

For these reasons I hold that the sum of £1,000, which the plaintiff either has received or is about to receive, is within the scope of section 1 of the Act of 1908 and should not be subtracted from the agreed figure of £1,300.

In these circumstances it is tempting to follow the example set in *Bowskill* v. *Dawson* (*No.* 2),[13] and express no view on the two other contentions relied on by the plaintiff. But as the case is of some importance and counsel pressed me to deal with these other contentions, I propose to do so in regard to one of them.

It was contended that in the present case, as in *Bowskill* v. *Dawson* (*No.* 2),[13] Green or his personal representatives had a right in equity to claim payment of the benefits set out in the schedule to the policy if an event occurred which rendered them payable. It was not, and in my view could not be, contended that there was anything in the present case which could fairly be regarded as comparable with the deed and the booklet which were the basis of the decision in *Bowskill* v. *Dawson* (*No.* 2).[13] But it was said that the employer, Russell, did impose upon himself an obligation enforceable in equity and constituted himself a trustee for employees included in the list of insured persons. Reliance was placed upon the wording of the recital, the payment of the premiums year by year and the recognition by his widow (the defendant) and her solicitors of an obligation to pay over to the plaintiff the sum received from the Yorkshire Insurance Company by reason of Green's death, evidenced by a letter dated June 16, 1955, from the defendant's solicitors to the plaintiff's solicitors.

The wording of the recital is: "Whereas the insured is "desirous of securing payment of benefits as hereinafter set "forth to any insured person . . . ," and it is contended that on its true construction this language amounts to a declaration of trust on the part of Russell, the insured, in favour of the insured persons respectively of such payments as might be made under the policy. Apart from this recital, there is in my judgment no evidence whatever that Russell himself intended to constitute himself a trustee of such payments. In *In re Schebsman* [14] Lord Greene M.R. said [15]: "An examina- "tion of the decided cases does, it is true, show that the

[12] [1954] 2 Q.B. 347.
[13] [1955] 1 Q.B. 13.
[14] [1944] Ch. 83; 60 T.L.R. 128; [1943] 2 All E.R. 768.
[15] [1944] Ch. 83, 89.

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" courts have on occasions adopted what may be called a liberal " view on questions of this character, but in the present case I " cannot find in the contract anything to justify the conclusion " that a trust was intended. It is not legitimate to import into " the contract the idea of a trust when the parties have given no " indication that such was their intention. To interpret this " contract as creating a trust would, in my judgment, be to dis- " regard the dividing line between the case of a trust and the " simple case of a contract made between two persons for the " benefit of a third." And in the same case, du Parcq L.J. said [16]: " It is true that, by the use possibly of unguarded " language, a person may create a trust, as Monsieur Jourdain " talked prose, without knowing it, but unless an intention to " create a trust is clearly to be collected from the language used " and the circumstances of the case, I think that the court ought " not to be astute to discover indications of such an intention." There is also a passage to the same effect (which I mention but do not set out) in the judgment of Lord Wright in the Privy Council in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*.[17]

Although the point is not conclusive, it is to be noted that the recital is part of a printed form and the language is that of the insurance company rather than that of the employer Russell or his legal advisers. Moreover, the language is at least consistent with a desire on his part to secure, that is, make sure, that there was money available to meet claims against him by any of his employees included in the list of insured persons, in the event of his own finances being insufficient.

As was pointed out by Mr. Van Oss, a good intention does not of itself create a trust, and even if it were right to infer that if Russell had survived he would not have wished to retain for himself the sum of £1,000 received in respect of Green's death, it is none the less true that a moral obligation is no basis for asserting an enforceable trust.

Reference was made to a number of reported cases, but apart from *Bowskill* v. *Dawson* (*No.* 2) [18] and *Prudential Staff Union* v. *Hall* [19] there was no close parallel to the present case, so far as this issue is concerned, and for that reason I refrain from citing them. In both the cases just mentioned there was ample material to justify the allegation of a trust. In my judgment, the plaintiff has failed to discharge the burden of satisfying me that a trust was created, and if the claim had depended on her doing so, it would have failed.

The third ground on which the claim was put forward involved the contention that at common law, although Green was not a party to the contract of insurance, he would have been entitled to claim under it, and accordingly his mother, the plaintiff, is

[16] [1944] Ch. 83, 104.
[17] [1933] A.C. 70, 78–80; 49 T.L.R. 90.
[18] [1955] 1 Q.B. 13.
[19] [1947] K.B. 685; 63 T.L.R. 392.

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equally so entitled. Support for this contention is to be found in the judgments of Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [20] and in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* [21] and possibly in the judgment of Devlin J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* [22] Since this contention raises an issue upon which legal opinion is divided and no decision regarding it is required in the present case, I prefer to take refuge in silence. The point is open to the plaintiff, in the event of an appeal.

The result is that there must be judgment for the plaintiff for the agreed sum of £1,300.

Judgment accordingly.

Solicitors: *Abbott, Baldwin & Co.; Greenwoods.*

J. F. L.

[20] [1949] 2 K.B. 500, 513; (sub nom. *Smith* v. *River Douglas Catchment Board*) 65 T.L.R. 628; [1949] 2 All E.R. 179.

[21] [1954] 1 Q.B. 250, 269; [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1475.

[22] [1954] 2 Q.B. 402, 421, 422; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.

[COURT OF APPEAL.]

FRY *v.* INLAND REVENUE COMMISSIONERS.

C. A.

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July 2, 3, 17.

Lord Evershed M.R., Romer and Ormerod L.JJ.

[1957 F. 1229.]

Revenue—Estate duty—Interest in expectancy—Deferred payment of duty—Purchase by life tenant of interest in expectancy—Falling into possession—Whether estate duty payable on the purchase price or at the death of life tenant or not at all—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 7 (6).

Statute—Construction—Argument ab inconvenienti—Relevance of results of alternative possible constructions—Equitable construction preferred—Estate duty statute.

A testator died in 1918 and by his will settled a share of his residuary estate upon trust to pay the income thereof to his daughter, N., during her life and after her death the capital to be held upon trusts for her issue and, in default of issue, for her brothers, the testator's four sons.

One of the four brothers, C., died in June, 1940, and his executors elected not to pay estate duty on his reversionary interest in his father's estate at once but to wait until the same fell into possession.

By an agreement dated June 22, 1954, N. purchased from the plaintiff, the surviving executor of C.'s will, his reversionary share and the interests of her other brothers in their father's residuary estate. The price paid for C.'s share was £39,750, based on an actuarial valuation on the footing that no estate duty would be payable under the testator's will on N.'s death, and the agreement

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provided for satisfaction of the purchase price by transfer of investments. N. was at the date of the agreement over 80 years old, a widow, and she had no children.

Held, (1) that the reversionary interest of N. "fell into possession" within the meaning of section 7 (6) of the Finance Act, 1894,[1] when it was purchased by N., and that estate duty accordingly then became payable on it.

On the language of section 7 (6) it could not be said that it was plainly wrong to hold either that the reversion fell into possession when it was purchased by N., or alternatively, when she died; accordingly, as there were two possible constructions the court could take account of the unavoidable difficulties and inconveniences which could follow from the latter construction and prefer the construction whereby the reversion fell into possession when it was purchased by N.

Dictum of Lord Reid in *Coutts & Co.* v. *Inland Revenue Commissioners* [1953] A.C. 267, 281; [1953] 2 W.L.R. 364; [1953] 1 All E.R. 418 applied.

(2) That that which became subject to duty on the date of the agreement in 1954 was the interest in expectancy and what had to be valued for the purposes of duty was what N. did not possess before, not the aggregate of that and her own life interest.

In re Eyre [1907] 1 K.B. 331 distinguished.

Decision of Danckwerts J. [1958] 2 W.L.R. 673; [1958] 1 All E.R. 819 reversed.

APPEAL from Danckwerts J.[2]

The following statement of the facts is taken from the judgment: By his will dated November 30, 1915, the testator, Francis Fry, settled a share of his residuary estate on trust to pay the income thereof to Norah Lilian Cooke-Hurle (hereinafter called "Mrs. Cooke-Hurle") during her life and subject thereto upon trust, in the event of Mrs. Cooke-Hurle having no issue, as to one-quarter thereof for Conrad Penrose Fry. The testator died on November 4, 1918. Conrad Fry died on June 5, 1940, and the plaintiff, Sir Geoffrey Storrs Fry, is his surviving executor. Mrs. Cooke-Hurle, who was born on January 3, 1871, is still living, is a widow and has had no issue. On the death of Conrad Fry his executors had an option under section 7 (6) of the Finance Act, 1894, either to pay the estate duty in respect of his reversionary interest under the testator's will

[1] Finance Act, 1894, s. 7 (6): "Where an estate includes an interest in expectancy, estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the estate duty in respect of the rest of the estate, then—(*a*) for the purpose of determining the rate of estate duty in respect of the rest of the estate the value of the interest shall be its value at the date of the death of the deceased; and (*b*) the rate of estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained."

S. 22 (1) (*j*): "... 'interest in 'expectancy' includes an estate in remainder or reversion and every other future interest whether vested or contingent, but does not include reversions expectant upon the determination of leases."

[2] [1958] 2 W.L.R. 673; [1958] 1 All E.R. 819.

expectant on Mrs. Cooke-Hurle's death without issue together with the duty in respect of the rest of Conrad Fry's estate, or to postpone payment of duty until the interest should fall into possession. The executors elected to postpone payment of the duty until the interest should fall into possession.

By an agreement dated June 22, 1954, the trustees of Conrad Fry's estate agreed to sell and Mrs. Cooke-Hurle agreed to buy for £39,750 the reversionary interest of Conrad Fry in Mrs. Cooke-Hurle's settled share of the residuary estate of the testator. The purchase price was arrived at on an actuarial valuation made on the footing that no estate duty would be payable under the testator's will on Mrs. Cooke-Hurle's death. The agreement was completed and the purchase price paid on or about November 1, 1954. In addition to purchasing the reversionary interest of Conrad Fry in her settled share, Mrs. Cooke-Hurle also agreed, by the same agreement, to purchase the other reversionary interests in her share. The result of the transaction was that Mrs. Cooke-Hurle became the owner of all the interests in remainder in her settled share and as, in view of her age, there was no possibility of her thereafter having issue, the trustees of the testator's will transferred into her sole name the investments then comprised in her settled share of the residuary estate of the testator.

As a result of correspondence between the plaintiff's solicitors and the Estate Duty Office as to what (if any) estate duty had become payable, or would in the future become payable, by the estate of Conrad Fry by reason of the said agreement, the plaintiff, on October 15, 1957, issued an originating summons asking for that and ancillary questions to be determined by the court. On March 12, 1958, Danckwerts J. made a declaration "that having regard to the completion of the purchase on or "about November 1, 1954, by Norah Lilian Cooke-Hurle of the "interest in the residuary estate of the late Francis James Fry "to which the said Conrad Penrose Fry deceased was at the "date of his death on June 5, 1940, contingently entitled in "reversion expectant on the death of the said Norah Lilian "Cooke-Hurle without issue the said contingent reversionary "interest will fall into possession for the purpose of section 7 "(6) of the Finance Act, 1894, on the death of the said Norah "Lilian Cooke-Hurle (if she dies without issue)."

The plaintiff appealed.

J. Pennycuick, Q.C., and *R. Cozens-Hardy Horne* for the plaintiff.

R. O. Wilberforce, Q.C., and *E. B. Stamp* for the Commissioners of Inland Revenue.

In addition to the cases referred to in the judgments, the

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following were cited in argument: *In re Parkes' Settlement* [3]; *St. Aubyn* v. *Attorney-General* [4]; *Inland Revenue Commissioners* v. *Priestley*.[5]

Cur. adv. vult.

July 17. LORD EVERSHED M.R. The judgment which I will ask Romer L.J. to read is the judgment of the court.

ROMER L.J. This appeal raises a somewhat difficult question as to the construction of section 7 (6) of the Finance Act, 1894, which deals with the payment of estate duty on interests in expectancy. [His Lordship stated the facts as set out above, read section 7 (6) and 22 (1) (*j*) of the Finance Act, 1894, and continued]: Counsel for the plaintiff and for the Inland Revenue Commissioners were agreed before us that, having regard to Mrs. Cooke-Hurle's age in June, 1954, when she agreed to purchase Conrad Fry's reversionary interest, the contingency of her having issue could and should be disregarded; and accordingly that the case should be dealt with on the footing that the interest which Conrad Fry's executors had and which Mrs. Cooke-Hurle purchased from them was an indefeasibly vested, and not merely a contingent, remainder in Mrs. Cooke-Hurle's settled share.

The question, then, which falls for decision can be posed as follows. A testator settles a fund on trust for A for life with remainder to B absolutely. B predeceases A and his executors exercise the option conferred by section 7 (6) of the Finance Act, 1894, to defer payment of duty on the reversionary interest until the interest falls into possession. A subsequently purchases the interest from B's executors. What duty (if any) falls to be paid by B's executors in consequence of the purchase, when is it payable, and how should it be assessed?

It would seem that there are four possible answers to this question. The official view (which was upheld by the judge's declaration) is that no duty is payable by B's executors until the death of A and that then duty will become payable on the value of the fund as then existing. The alternative official view is that duty becomes payable upon the execution of the sale agreement and that such duty is assessable upon the value of the fund (and not merely on the value of the reversion) at the date of the agreement. The plaintiff contends that duty becomes payable upon the execution of the sale agreement but that such duty is only assessable upon the then value of the reversionary interest. The plaintiff alternatively contends that no duty is payable or ever will become payable at all.

There does not appear to be any decided case which has any direct bearing on the present problem. Reference was made to some observations by Hanna J. in *In re O'Connor's Estate* [1]

[3] [1956] 1 W.L.R. 397.
[4] [1952] A.C. 15, 32; [1951] 2 All E.R. 473.
[5] [1901] A.C. 208; 17 T.L.R. 507.
[1] [1931] 1 Ir.R. 98.

but the circumstances of that case differed in a vital respect from those of the present. In *In re O'Connor's Estate* [1] real estate was devised on trust for A for life with remainder to his children as he should appoint, and if there should be no son of A who should attain the age of 21 years then in trust for B. B died in A's lifetime and A (who was B's administrator and heir-at-law) postponed payment of estate duty in respect of B's contingent interest. Subsequently A died without issue and a question arose as to the liability of B's estate to payment of duty in respect of B's interest in the devised land. It was held that the Inland Revenue Commissioners were entitled to claim estate duty on the death of B in respect of his contingent estate in the lands which passed on his death to A and that the rate of duty was to be calculated according to the value of that interest when it fell into possession on the death of A together with the value of the rest of B's estate. In the course of his judgment Hanna J. said [2]: "In my "opinion an interest in expectancy, within the meaning of the "Act, whether it be in remainder or reversion, or whether vested "or contingent, 'falls into possession' within the meaning of "section 7 (6) when the events which rendered it in expectancy "have happened, and there has accrued an immediate right to "present enjoyment of the property by actual occupation, or "receipt of rents and profits. . . . The death of A is the event "which, under the option given by section 7 (6), makes the "duty on the death of B alternatively leviable and payable."

We do not derive much assistance from these observations in the present case. The point which is now before us does not appear to have been argued, and in any event B's reversionary interest remained contingent down to the date of A's death, whereas in the present case Conrad Fry's reversionary interest had become vested, by reason of Mrs. Cooke-Hurle's age, at the time when she acquired it. It clearly cannot be contended that a contingent reversionary interest ripens into an interest in possession unless and until the contingency occurs; but different considerations may well arise where, as here, the reversionary interest is vested and indefeasible.

The question, then, before us is free from authority and falls to be determined on the meaning and effect of the language of section 7 (6) of the Act. The subsection is not drafted with strict accuracy on any view of the matter. It speaks of an interest in expectancy falling into possession, whereas such an interest always is in possession from the date when the instrument which creates it takes effect. What does, or may, fall into possession is the property in respect of which the interest in expectancy has been created; and it was presumably in that sense that the legislature referred to the interest itself falling into possession. Apart altogether from this inaccuracy

[1] [1931] 1 Ir.R. 98.
[2] Ibid.

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of language the provisions of the subsection are by no means easy to apply to cases where a life tenant sells or voluntarily surrenders his life interest to the remainderman or where, as here, the life tenant purchases the interest of a deceased reversioner; and it is, we think, a fair assumption that in fact the draftsman of the subsection had no such possibilities in mind.

As we have previously indicated, the official view of the Inland Revenue Commissioners is that where a life tenant purchases a vested reversion in the settled property, and payment of duty has been postponed, in pursuance of the statutory option, on the reversioner's death, the resulting coalescence of interests should be disregarded for relevant purposes and that no duty becomes payable until the life tenant actually dies. Mr. Wilberforce frankly conceded that this view may lead to difficulties and inconvenience, but he submitted that it is justified by the language in which the subsection is framed. The contention is that an interest in expectancy "falls into possession" when that event occurs upon the happening of which the interest was expectant in accordance with the terms of the instrument which created the interest. The Crown's submission is that the word "falls" in the material phrase points in the direction of some external event which is going to happen and not in the direction of some artificial event brought about by the beneficiaries themselves; in other words, and putting it more shortly, the official attitude is to adhere to the trusts of the settlement. Section 7 (6), submitted Mr. Wilberforce, is only concerned with fixing a date. That date is the date of an event prescribed by the instrument and a reversionary interest cannot "fall into possession" until that event has happened, even though the life tenant acquires it previously.

Mr. Pennycuick, for the plaintiff, on the other hand, pointed out some of the results which would necessarily follow if the official view were adopted. He said that supposing a life tenant bought a vested reversion from the reversioner's executors, had the settled fund transferred to him and died some 20 or 30 years later it would be virtually impossible at his death to ascertain of what the fund consisted and what its then value was. The fund, even if traceable (and assuming the Crown were entitled to trace it into other assets for the purpose of fixing the reversioner's estate with duty), might have been invested so skilfully by the tenant for life as to have doubled or trebled in value by the time of his death. On the other hand, the life tenant might have spent it all or become bankrupt. There could accordingly be no certainty as to, and no means of ascertaining, the amount of duty which the executors might have to pay or the time when they would have to pay it; and when the time for payment did fall due the amount of the duty might well exceed the price for which the executors had sold the reversion. Mr. Pennycuick then suggested that the official view, if adopted,

would logically have to be applied to the converse case of the reversioner acquiring the life tenant's interest, and would lead to similarly extraordinary results. If, submitted Mr. Pennycuick, a life tenant surrenders his life interest to the reversioner, or the reversioner buys the life interest, and the reversioner survives the life tenant by 20 years, it would be impossible to suggest that the reversion fell into possession on the death of the life tenant; for it would already have fallen into possession (in the sense of the property falling into the reversioner's possession) 20 years before. Yet such would be the effect of applying the official view.

Mr. Pennycuick contended that the difficulties of adopting the construction of the subsection which the commissioners have submitted, go most of the way towards showing that it cannot be right. The plaintiff's own case is that either Conrad Fry's reversion fell into possession when Mrs. Cooke-Hurle agreed to buy it or it will never fall into possession at all. Although the latter of these alternatives would be the most favourable to the plaintiff he only put it forward as subordinate to the first. As to this Mr. Pennycuick submitted that on signing the sale agreement Mrs. Cooke-Hurle became entitled, by virtue of the instrument which created the interest in expectancy, to the right to have possession of and dispose of the property in which the interest subsisted. His argument was, in summary, as follows: The enlargement of Mrs. Cooke-Hurle's enjoyment of the income of the fund into an absolute power of disposition can reasonably be said to constitute a "falling into possession" of the interest in expectancy. Before that enlargement took place it could be said that the reversion would fall into possession in futuro but such could no longer be said after the life tenant had acquired it; it in fact fell into possession in the hands of the tenant for life, as the reversioner's assign, when she bought the interest, for thereupon the funds in which the interest had previously subsisted became transferable to her as her sole and absolute property. In the ordinary case, said Mr. Pennycuick, of property being settled on trust for A for life with remainder to B absolutely the settlement is at an end when the two interests coalesce; and there is no difference between that case and the present, where the tenant for life is past child-bearing and becomes entitled to have the trust fund handed over to her. The interests coalesce, the settlement ceases and so does the trust fund as such.

It seems to us that on the language of section 7 (6) neither the view of the Inland Revenue Commissioners nor that of the plaintiff can be said to be obviously wrong. The court, then, when faced with two possible constructions of legislative language, is entitled to look at the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament. "In general," said Lord Reid in *Coutts & Co.* v. *Inland*

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Revenue Commissioners,[3] "if it is alleged that a statutory provision brings about a result which is so startling, one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results." It does not seem to us that there is any satisfactory answer to such difficulties as those to which Mr. Pennycuick referred which are involved in the view that duty, in such cases as the present, does not become payable until the death of the tenant for life and that it is then exigible on the value of the whole settled fund as then existing. Such a view, moreover, would possibly run counter to the general principle that an executor should pay duty at the time when he has money in hand with which to pay it. This principle would be satisfactorily applied in such cases as the present (subject to the next question which falls to be considered) if the date of payment of the duty is the date of the sale agreement; for the reversioner's executor has the purchase price in hand with which to pay an immediately ascertainable duty. In our judgment, accordingly, the contention of the plaintiff, which is at least as acceptable on the mere question of construction as that of the Crown, is preferable in its results, and effect should therefore be given to it.

On that view of the matter the subordinate contention of the plaintiff that no duty is payable at all does not succeed; and beyond observing that it would be somewhat startling if payment of duty could be avoided altogether by the simple expedient of a life tenant purchasing a deceased reversioner's interest in expectancy from executors who had exercised the option conferred by section 7 (6), we need say no more about it.

On the footing, then, that Conrad Fry's interest in expectancy fell into possession when Mrs. Cooke-Hurle agreed to buy it, the next question that arises is as to the assessment of the duty which became payable by his executor, the plaintiff. The Crown contends that duty became payable upon the value of the whole fund. The plaintiff submits that, for purposes of duty, the interest should be taken at its then value as a reversion and that duty is only exigible in respect of that value. It was decided in *In re Eyre* [4] and is now the established practice, that where under section 7 (6) of the Act an executor of a deceased reversioner has exercised the option thereby given and deferred the payment in respect of the interest in expectancy until that interest has fallen into possession, the amount on which the duty is payable is the value of the interest when it has fallen into possession, and not merely its value on the death of the deceased. The Crown says that the plaintiff cannot have it both ways and that if he succeeds in establishing that Conrad Fry's interest in expectancy fell into

[3] [1953] A.C. 267, 281; [1953] 2 W.L.R. 364; [1953] 1 All E.R. 418.

[4] [1907] 1 K.B. 331.

possession when Mrs. Cooke-Hurle agreed to buy it then he must take the consequences and one of such consequences is that the principle of *In re Eyre* [4] applies. Mr. Wilberforce submitted that as the parties chose to accelerate the falling into possession of Conrad Fry's interest they must abide by the results and the executor must pay duty on the footing that the whole fund did in fact fall into possession in the hands of Mrs. Cooke-Hurle, as Conrad Fry's assign; and that the assumption that her life interest still continued to exist cannot co-exist with the assumption that the reversionary interest had fallen into her possession. Mr. Stamp, in supporting Mr. Wilberforce's submission, submitted that a vested reversionary interest ripens sooner or later into the right to possession of the property in which the interest has been created, and the reversioner's executor is entitled to postpone payment of duty until he (or his assign) has acquired such possession; that it is irrelevant how possession is acquired or if it is acquired prematurely, for example by surrender of the life tenant's interest; and that in the present case Mrs. Cooke-Hurle, as assign of the reversioner, did get possession of the property, albeit prematurely. The plaintiff, on the other hand, contends that what has to be valued, and that which attracts liability to duty, is the interest in expectancy at the moment of time when it fell into possession. At the life tenant's death, it is said, the value of the reversion is the value of the property itself, for no prior interest stands in its way; but that in the present case there were two interests which coalesced in Mrs. Cooke-Hurle's hands, namely, her life interest and the reversionary interest which she bought, and that the value of the property is not solely represented by the interest in expectancy but is the sum of that interest and the life interest. It was submitted that Mrs. Cooke-Hurle has not given up her life interest; that merger is a question of intention and the amount of duty payable could not depend on whether Mrs. Cooke-Hurle did or did not make a declaration against merger when she bought the reversionary interest.

The case for the Crown on this point is certainly not without attraction and makes a logical appeal. Nevertheless it could lead to unexpected consequences, some of which were pointed out by Mr. Pennycuick. He suggested by way of illustration the case of a young tenant for life of a fund worth £100,000, buying for £10,000 the interest of a deceased reversioner, whose executors had exercised the option conferred by section 7 (6). In such a case the executors, though receiving only £10,000, would be liable to duty on the full value of the fund, namely, £100,000. Mr. Wilberforce's answer to this was that the executors need not enter into such a transaction and must accept the consequences if they do. This is true; but they might find it necessary to sell the reversion and obviously the highest bidder for it would be the life tenant, for he is the only person on whose death no duty

[4] [1907] 1 K.B. 331.

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would become payable in respect of it. We cannot think that in Mr. Pennycuick's illustration the Crown's claim would be in accord with the intention of section 7 (6) of the Act. It seems to us that such a claim would be wholly inequitable and we would again refer to Lord Reid's observations in *Coutts & Co.* v. *Inland Revenue Commissioners*,[5] already cited. In our opinion that which became subject to duty was that which Mrs. Cooke-Hurle bought, namely, the interest in expectancy; and it would be quite wrong to say that for the purposes of valuing that interest Mrs. Cooke-Hurle's pre-existing right to enjoy the income of the fund for the rest of her life should be disregarded. That which has to be valued, in our judgment, was that which she did not possess before and not the aggregate of that and her own life interest. As we say, we are conscious of the difficulty of reconciling the view that Conrad Fry's reversionary interest fell into possession when Mrs. Cooke-Hurle agreed to buy it with the further view that for the purpose of valuation it had to be treated as still being an interest in remainder. As we have already indicated, however, such a transaction as that now under consideration was not apparently contemplated by the draftsman of the Act, who at all events failed to make any express provision for it. In the circumstances the court must do the best it can to apply the relevant legislation to particular, and apparently unforeseen, facts —as it did in 1956 in the case before this court of *Shrewsbury (Earl of)* v. *Inland Revenue Commissioners*.[6] In so applying section 7 (6) of the Act to the facts of the present case we are satisfied that the reconciliation to which we have referred can be achieved without subjecting the language of the subsection to an illicit strain, and should be achieved in the interests of justice.

In our judgment, accordingly, the appeal should be allowed.

Appeal allowed.

Solicitors: *Rider, Heaton, Meredith & Mills for Osborne, Ward, Vassall, Abbot & Co., Bristol; Solicitor of Inland Revenue.*

E. D.

[5] [1953] A.C. 267, 281. [6] [1956] T.R. 383.

[QUEEN'S BENCH DIVISION.]

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Sale of Goods—C.i.f.—Route—Customary at time of performance—Closure of canal—Frustration.

Contract—Frustration—C.i.f. contract—Usual and customary route via Suez blocked—Whether obligation to send goods round Cape.

Contract — Performance — Customary manner — Time when manner customary.

By a written contract dated September 6, 1956, sellers agreed to sell to buyers cottonseed cake for shipment from Port Sudan

during October/November at sellers' option, c.i.f. Belfast. At the date of the contract the usual and customary route for the shipment of goods from Port Sudan to Belfast was via the Suez Canal. On November 2, the Suez Canal was closed to navigation. The sellers did not ship the contract goods:—

Held, (1) that where a contract expressly, or by necessary implication, provides that performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for.

(2) That the sellers' obligation under the present contract was not confined to shipping by a route which was usual and customary at the date of the contract, but was to ship by a route usual and customary at the time of performance.

(3) That the continued availability of the Suez route was a fundamental assumption at the time when the contract was made, and to impose on the sellers the obligation to ship by an emergency route via the Cape would be to impose on them a fundamentally different obligation, and, accordingly, the contract was frustrated.

SPECIAL CASE stated by the Board of Appeal of the London Cattle Food Trade Association.

By a contract dated September 6, 1956, on the standard printed form No. 6 headed "Contract for Imported Feeding "Cakes and Meals—C.I.F. Terms" issued by the London Cattle Food Trade Association, the appellants, Carapanayoti & Co. Ltd., London (hereinafter called the sellers), sold to E. T. Green Ltd., Belfast (hereinafter called the buyers), through brokers, by whom the contract was negotiated, 100 tons of Sudanese semi-decorticated expeller cottonseed cake at £28 15s. per ton of 2,240 lbs. for shipment per steamer and/or steamers, direct or indirect, with or without transhipment from Port Sudan during October/November, 1956, at sellers' option, cost, freight and insurance to Belfast. Clause 17 of the contract provided: "In case of pro-"hibition of export, blockade or hostilities or in case of any "executive or legislative act done by or on behalf of the govern-"ment of the country of origin or of the territory where the "port or ports of shipment named herein is/are situate, pre-"venting fulfilment, this contract or any unfulfilled portion "thereof so prevented shall be cancelled. In the event of "shipment proving impossible during the contract period, sellers "shall advise buyers without delay with the reasons therefor. "If required, sellers must produce proof to justify their claim "for cancellation." The sellers covered themselves for the sale by a contract of the same date for the purchase of a like quantity of goods of the contract description from Sudan Oil Mills Ltd., Khartoum, with whom they were closely associated in business. A warehouse certificate was produced and admitted in evidence to show that Sudan Oil Mills Ltd. had 500 tons of the contract goods in warehouse on September 1, 1956. The contracts for sale and purchase were entered into after the Suez Canal had been nationalized, that event having taken place on July 26, 1956. On October 29, 1956, armed forces of Israel invaded

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Egypt. On November 1, Britain and France began military operations in Egypt; on November 2 the Suez Canal was closed to navigation; on November 6 the cease-fire was declared in Egypt; on April 9, 1957, the Suez Canal was re-opened to navigation. On November 13, 1956, Sudan Oil Mills Ltd. wrote to the sellers saying that they regretted that they would be unable to fulfil several contracts including the sale to the buyers, and requesting the sellers to do whatever was necessary to protect the interests of Sudan Oil Mills Ltd. On December 10, 1956, the buyers wrote to the sellers giving notice of arbitration on the ground that the shipment had not taken place within the contracted period. On December 13, 1956, the sellers replied: "Our shippers have been prevented from fulfilling this contract "by the recent hostilities in Egypt, during which the Suez "Canal became, and still remains blocked. They and we "therefore claim cancellation under clause 17. Alternatively "we contend that this contract has been frustrated by the "blockage of the Suez Canal." By letter dated December 14, the buyers repudiated the sellers' contentions.

On the dispute being submitted to arbitration and the arbitrators being unable to agree, the matter was referred for decision to an umpire, who, on February 20, 1957, issued the following award: "I do hereby award that the seller is in default "and shall pay to the buyers within 14 days the difference "between the contract price and the settling price of £31 15s. "per 2,240 lbs. on the mean contract quantity." The sellers, being dissatisfied with the award, appealed to the Committee of the Association who elected a Board of Appeal to determine the matter.

By paragraph 4 of the case the Board of Appeal set out that they were requested to state their award in the form of a special case and the question of law for the decision of the court should be as follows: Whether on the true construction of the contract and the fact found (a) the contract was frustrated; or (b) performance was excused by clause 17. By paragraph 12 (1) of the special case, the Board of Appeal held, subject to the decision of the court, that the sellers were in default. They accordingly awarded that the umpire's award dated February 20, 1957, should be and was confirmed. They directed that the sellers should pay the costs, charges and expenses incurred by the sellers and the buyers and the hearing fees, costs and expenses. By paragraph 12 (2) the Board stated that should the answer to the question of law in paragraph 4 result in the sellers being held by the court not to have been in default, then for the purposes of giving effect to that decision, the Board directed that the umpire's award be set aside and the buyers to pay the parties' costs of the hearing incurred by the buyers and also those incurred by the sellers and the hearing fees, costs and expenses.

The facts proved or admitted before the Board of Appeal in so far as relevant are fully set out in the judgment of McNair J.

Eustace Roskill Q.C. and *R. A. MacCrindle* for the sellers.
Michael Kerr for the buyers.

In addition to those cases referred to in the judgment, the following cases were cited in argument: *Agrimpex Hungarian Trading Co. for Agricultural Products* v. *Sociedad Financiera de Bienes Raices S.A.*[1]; *Shipton, Anderson & Co.* v. *John Weston & Co.*[2]; *Produce Brokers Co. Ltd.* v. *Olympia Oil and Cake Co. Ltd.*[3]; *Palgrave, Brown & Son Ltd.* v. *Owners of S.S. Turid*[4]; *Krell* v. *Henry*[5]; *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*[6]; *In re Comptoir Commercial Anversois* v. *Power, Son & Co.*[7]; *Howell* v. *Coupland*[8]; *W. J. Sargant & Sons* v. *Eric Paterson & Co.*[9]; *Société Co-operative Suisse des Céréales et Matières Fourragères* v. *La Plata Cereal Co. S.A.*[10]; *S.S. Matheos* v. *Louis Dreyfus & Co.*[11]

Cur. adv. vult.

McNAIR J. This matter comes before me in the form of an award stated by the Board of Appeal of the London Cattle Food Trade Association in the form of a special case on certain questions of law for the decision of this court and raises important questions as to the effect of the closing of the Suez Canal in November, 1956, upon c.i.f. contracts for the sale of goods to be shipped from ports to the south of Suez made at a time when the only usual and customary route for shipment of such goods was via the Suez Canal.

The following facts are taken from the special case. By a contract dated September 6, 1956, on the standard printed form headed: "Contract for Imported Feeding Cakes and Meals: "C.i.f. terms" issued by the London Cattle Food Trade Association, Carapanayoti & Co. Ltd. of London (hereinafter referred to as the sellers) agreed to sell to E. T. Green Ltd. of Belfast (hereinafter referred to as the buyers) 100 tons of Sudanese semi-decorticated cottonseed cake at £28 15s. 0d. per ton for shipment per steamer or steamers, direct or indirect, with or without transhipment, from Port Sudan during October/November at sellers' option, cost, freight and insurance to Belfast.

[His Lordship read clause 17 of the contract and continued]: The Suez Canal was nationalized on July 26, 1956; but at the

[1] [1957] 1 W.L.R. 1228; [1957] 3 All E.R. 626.
[2] (1922) 10 Ll.L.Rep. 762.
[3] [1916] A.C. 314; 32 T.L.R. 115.
[4] [1922] 1 A.C. 397; 38 T.L.R. 423.
[5] [1903] 2 K.B. 740; 18 T.L.R. 823.
[6] [1916] 1 K.B. 495; 32 T.L.R. 186.
[7] [1920] 1 K.B. 868.
[8] (1876) L.R. 1 Q.B. 258.
[9] (1923) 129 L.T. 471.
[10] (1947) 80 Ll.L.Rep. 530.
[11] [1925] A.C. 654; 41 T.L.R. 393.

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date of the contract, namely September 6, 1956, the usual and customary route for the shipment of goods from Port Sudan to Belfast was via Suez and the route via the Cape was not a usual or customary route for such shipments.

Though, after nationalization, it was shown that shipments via the Canal were uncertain and subject to delay, sellers and buyers of cotton seed cake from Port Sudan c.i.f. United Kingdom ports at a time when the contract in question was made would assume that the goods, as theretofore, would be shipped via the Canal, and it was not then generally known that vessels passing through the Canal ran risks of detention or confiscation.

On October 29, 1956, armed forces of Israel invaded Egypt; on November 1, Great Britain and France began military operations in Egypt, and on November 2, the Suez Canal became closed to navigation by reason of the physical blocking of the Canal by the Egyptian authorities, such action being by concession rightly made before me an act of hostilities within the meaning of clause 17. On November 6, the cease-fire was declared in Egypt. After the closure of the Suez Canal to navigation on November 2, freight via the Canal became impossible and all shipments from the Sudan had to be made via the Cape until the Canal was reopened to shipping on April 9, 1957. During the months of October and November, 1956, no goods of the contract description were shipped from Port Sudan for Belfast on vessels which, in fact, proceeded on their voyage via the Suez Canal; but during November, 1956, 14 vessels called on various dates at Port Sudan, loaded cargo and proceeded to their several destinations in the United Kingdom and elsewhere in Europe via the Cape. The distance from Port Sudan to Belfast via the Suez Canal is 4,068 miles and via the Cape 10,793 miles. Before the closing of the Canal the normal freight rate for the voyage from Port Sudan to Belfast was £6 10s. per ton. On November 9, 1956, a surcharge of 25 per cent. was imposed on freight as a result of the closing of the Canal, which was increased on December 12 to 100 per cent.

Though the sellers had covered themselves for their sale by a purchase on the same date from Sudan Oil Mills Ltd., Khartoum, and 500 tons of goods complying with the contract were in warehouse at Khartoum at that date, no space was at any time booked by the sellers for the shipment of the 100 tons, and they made no endeavour at any time to procure shipping space for their shipment. It was apparent very soon after the closing of the Canal that the closing would last a considerable time—certainly until after the end of November. The sellers could not, after the closing of the Canal on November 2, have purchased afloat on c.i.f. Belfast terms 100 tons of the contract goods shipped from Port Sudan to Belfast in October or November, 1956, via the Suez Canal.

(The case also raised questions as to an alleged trade custom as to the acceptance by Belfast c.i.f. buyers of cottonseed cake

from Sudan of transhipment bills of lading issued at a port of transhipment instead of through bills of lading from the port of shipment to the port of ultimate destination; but as this custom was negatived by the Board of Appeal no question now arises upon it.)

The question left for the decision of this court is whether, on the true construction of the contract and on the facts found, (a) the contract was frustrated, or (b) performance was excused by clause 17. Subject to the decision of the court on this question, the Board of Appeal, affirming the original umpire, found the sellers to be in default.

It was common ground between the parties, and, indeed, is clear law: (1) That under this form of contract the seller performs his obligation by shipping or procuring the shipment of goods of the contractual description on a vessel bound for the contractual destination (subject to the right of transhipment where specified in the contract) and by tendering to the buyer the shipping documents, namely, an invoice for the amount due, a bill or bills of lading for the carriage of goods and a policy of insurance covering the goods to their destination; and (2) that, where as here the time of shipment is specified as, for example, "October/November at sellers' option," the seller has until the last day of permitted shipment in which to perform his shipping obligations. The seller must also, subject to any expressed term in the contract, ship the goods in such condition that, when carried under normal conditions of carriage, they will, in the absence of extraneous circumstances, arrive in sound condition. In this concise statement of the seller's obligations I have omitted the qualification that the seller can perform this obligation by procuring or buying on the market a bill or bills of lading issued to shippers other than himself, provided that the bill or bills of lading comply with the contract since, as stated above, it is found by the case that the sellers could not, after the closure of the Canal, have purchased afloat on c.i.f. Belfast terms 100 tons of the contract goods shipped from Port Sudan to Belfast in October or November, 1956, via the Suez Canal.

In these circumstances, the first way in which the sellers put their case was as follows: (1) A c.i.f. seller performs his contractual obligations (so far as is material on the facts found) only by shipping goods of the contractual description and by procuring and tendering a bill or bills of lading providing for carriage by a route which is *at the date of sale contract* a usual and customary route, or, if there is, at that date, only one usual and customary route, by that route; (2) the parties to the contract not having specified the route, the contract has to be construed as if the usual and customary route had been written out in full in the sale contract; (3) the usual and customary route at the date of the sale contract was via the Suez Canal, and the route via the Cape was not a usual and customary route; (4) there must, accordingly, be written into the contract after the words "from

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"Port Sudan" the words "via Suez Canal"; (5) performance of the contractual obligation as to shipping so specified became impossible owing to the occurrence of a supervening event beyond the control of both parties, namely, the closing of the Suez Canal on November 2, and, accordingly, both parties were discharged from the contract on the grounds of frustration.

The validity of this argument, or this method of putting the case, depends on two main submissions: (1) That the nature and extent of the shipping obligation, in particular in relation to route, must be ascertained as at the date of the sale contract; and (2) that the route so ascertained must then be written into the contract. The buyers join issue on both these points.

It is true that in *In re L. Sutro & Co. and Heilbut, Symons & Co.*,[1] in the Court of Appeal, there are passages in the judgments which support the sellers' argument on the former point. In that case the facts were shortly as follows: By a contract dated March 27, 1916, on the printed form for c.i.f. sales issued by the Rubber Trade Association the sellers agreed to sell to the buyers 25 tons of rubber c.i.f. to be shipped from the East to New York. The sellers made a declaration of shipment from Singapore via Seattle on the Pacific Coast of the U.S.A. to be forwarded thence by rail to New York. Buyers rejected the tender and claimed arbitration. The arbitrators found that after the outbreak of war in August, 1914, great difficulty was experienced in obtaining space for shipment from the East and, in consequence of this difficulty, in about October, 1915, shipments, namely, before the contract date, from the East to the Eastern States of the U.S.A., which had hitherto gone directly or indirectly the whole distance to New York by sea, began to be made by steamers to a port on the Western seaboard of the U.S.A., whence they were transmitted by rail to destination, and that at the date when the contract was entered into this route was well known to those engaged in the trade as one of the usual routes for rubber sold on contracts in the form of that then in issue. The arbitrators, subject to the opinion of the court, upheld the tender as a good tender. Swinfen Eady L.J. and Bray J., affirming Lush J., held that the tender was bad on the grounds that, on the construction of the particular contract there in question, a custom or usage permitting a substantial part of the transit to be by rail would be inconsistent with, and repugnant to, the express terms of the contract which provided, in effect, for transport by a sea-going vessel. Scrutton L.J. dissented.

It is, in my judgment, quite clear that, having regard to the fact that the alternative route by rail was in existence at the date of the contract, the point at present in issue was not present in the minds of the court.

In principle, it seems to me that where a contract expressly, or by necessary implication, provides that performance, or a

[1] [1917] 2 K.B. 348.

particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for. This is particularly so in the case of forward contracts like many c.i.f. contracts which call for performance at some future date, when one bears in mind that in mercantile matters custom and usage are subject to rapid change: see the speech of Lord Wright in *Reardon Smith Line Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[2] For example, in times of strained international relations the customary form of bills of lading may change by the universal acceptance of a particular form of war-risk protection. Can it be said that the seller is bound to tender the form of bill of lading which was customary at the date of the contract when, by the time when performance has arrived, that form has been supplanted by another customary form? I think not.

In *Postlethwaite* v. *Freeland*[3] it was held that the charterers' obligation under a charterparty to discharge with all despatch according to the custom of the port must be judged in reference to all the circumstances existing at the time of discharge. Again, when a charterparty provides for the nomination of a safe port by the charterer, it is not sufficient that the port is safe when nominated; it must be safe when the vessel arrives. A fortiori, it is not sufficient that it is safe at the date of the contract. *Duncan* v. *Köster* (*The Teutonia*).[4]

In my opinion, as a matter of principle, the sellers' obligation under a contract such as this is not confined to shipping by a route which was a usual and customary route at the date of the sale contract, but is to ship by a route usual and customary at the time of performance. I am fortified in this conclusion by the observations (admittedly obiter) of Roche J. in *Upjohn* v. *Hitchens*,[5] following Hamilton J. in *Biddell Brothers* v. *E. Clemens Horst Co.*[6] to the effect that on a sale of goods on c.i.f. terms the seller's obligation as to insurance is to insure upon terms current in the trade at the time when he comes to insure, and I do not think that the fact that in the contract here in question express provision to that effect is made in clause 16 in relation to insurance should deter me from applying the principle to the form of the bill of lading and the route.

If this is right, it is not necessary to express any concluded opinion on the second point, namely, whether the legal effect of a finding that the only usual and customary route at the date of the contract was via the Suez Canal is the same as if the words "via Suez Canal" were expressly written into the contract. It is sufficient to say that, in my opinion, there may well be cases in which the legal effect would be different.

[2] [1939] A.C. 562, 576; 55 T.L.R. 929; [1939] 3 All E.R. 444.
[3] (1880) 5 App.Cas. 599.
[4] (1872) L.R. 4 P.C. 171.
[5] [1918] 1 K.B. 171.
[6] [1911] 1 K.B. 214, 220.

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I now turn to the alternative way in which the sellers put their case, namely, that it was an implied term of the contract of sale that at the time when, within the contract period, the sellers elected to ship the goods, the Suez Canal should be available, or (putting the case slightly differently) that to enforce the sale contract in the changed circumstances after the closing of the Suez Canal would be to enforce a different contract because the obligation to procure shipment via the Cape would be a different obligation from procuring shipment via Suez, and that accordingly, on the closure of the Suez Canal, the contract was frustrated.

In approaching this method of putting the case I should first deal with the broad submission advanced on behalf of the buyers that, in the case of a contract for the sale of unascertained goods, the doctrine of frustration can only operate in very exceptional circumstances. It was submitted that there was no reported decision in which the doctrine had been applied to such a contract, except where the frustration was based upon subsequent illegality. This may be so, but I am not satisfied that it is so. The matter is fully discussed in Lord McNair's "Legal Effects of War," 3rd ed., at pp. 307 et seq. I refer in particular to the judgment of Russell J. in *In re Badische Co. Ltd.*[7] where the judge says: "I can see no reason why, "given the necessary circumstances to exist, the doctrine should "not apply equally to the case of unascertained goods. It "is, of course, obvious from the nature of the contract that "the necessary circumstances can only very rarely arise in the "case of unascertained goods." Further, I venture to doubt whether *Ashmore & Son* v. *C. S. Cox & Co.*,[8] though accepted as accurate by Pickford L.J. in *Blackburn Bobbin Co. Ltd.* v. *T. W. Allen & Sons Ltd.*,[9] is consistent with modern authorities, unless it is explained on the footing that it was not, in fact, a case of supervening impossibility, the war having broken out before the date of the contract. (See "Legal Effects of War," supra, at p. 304.) I therefore approach the problem from the point of view that the doctrine of frustration may be applied to a contract for the sale of unascertained goods, though it can only properly be applied to such a contract in exceptional circumstances.

Though, after the decision in the House of Lords in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*,[10] many believed that the theory of the implied term had been authoritatively accepted as the basis of the doctrine of frustration, the embers of this old controversy glowed again in the decisions of the House in *British Movietonews Ltd.* v. *London & District Cinemas Ltd.*[11] and in *Davis Contractors*

[7] [1921] 2 Ch. 331, 382.
[8] [1899] 1 Q.B. 436.
[9] [1918] 2 K.B. 467, 470.
[10] [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165.
[11] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

Ltd. v. *Fareham Urban District Council*[12]; and I feel that it would be presumptuous for me to attempt to choose between the different tests suggested and unnecessary because, on my appreciation of the facts, the same result would follow whichever of the classic tests is accepted.

On the basis of the speeches in the last case cited, Mr. Kerr, on behalf of the buyers, in my judgment rightly posed the following three questions, which he submitted should each receive a negative answer: (1) Must the parties have made their bargain on the basis that, if the Canal was no longer available when the sellers elected to perform, the contract would be off?: see per Lord Radcliffe,[13] adopting the language of Lord Loreburn in *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.*[14] (2) Was the closure of the Suez Canal a circumstance fundamental enough to transmute the sellers' obligation into an obligation of a different kind, which the contract did not contemplate, and to which it could not apply?: see per Lord Reid,[15] adopting the language of Asquith L.J. in *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioners of Works.*[16] (3) Would the answer to the "officious bystander" have been: "Of course, if the Canal is closed after November 2, the contract "is off"?: see MacKinnon L.J. in *Shirlaw* v. *Southern Foundries (1926) Ltd.*[17] and Lord Radcliffe in the case last cited.[18]

It is the function of the court to determine, as a matter of law, whether frustration arises on the court's appreciation of the facts found and of the legitimate inference to be drawn from such facts. In my judgment, on the facts as stated in the case, each of these questions must be answered in the affirmative. At the time when the contract was made buyers and sellers of cotton seed cake from Port Sudan c.i.f. United Kingdom ports would assume that the goods, as theretofore, would be shipped via the Canal. The Suez Canal had, since its opening, been one of the main arteries of international trade, and at the time when the contract was made was the only usual and customary route for the shipment of goods from Port Sudan to United Kingdom ports. No one would think of shipping by any other route. It is difficult to conceive of any more fundamental change in such a trade than the closing of the Canal, and there is no finding in the case that, at least up to the end of November, 1956, the route via the Cape was anything more than an emergency route. Though it is true that an increase of freight rate of 25 per cent. falling on the seller would not of itself warrant the discharge of the contract, since mere commercial unprofitableness does not justify

[12] [1956] A.C. 696.
[13] Ibid. 727.
[14] [1916] 2 A.C. 397, 403; 32 T.L.R. 677.
[15] [1956] A.C. 696, 723.
[16] [1949] 2 K.B. 632; 667; [1950] 1 All E.R. 208.
[17] [1939] 2 K.B. 206, 227.
[18] [1956] A.C. 696, 728.

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frustration especially in a speculative forward contract: see per Lord Sumner in *Larrinaga & Co. Ltd.* v. *Société Franco-Américaine des Phosphates de Medulla, Paris*,[19] yet the voyage via the Cape was more than 2½ times the length of the voyage via the Canal and includes what the author of "The Second "World War" feelingly describes as "the long haul round "the Cape"—a circumstance which may involve the seller in quite different obligations as to the condition of the goods on shipment from that involved in shipment via the Canal.

I feel no doubt at all that the continued availability of the Suez route was a fundamental assumption at the time when the contract was made, that to impose upon the sellers the obligation to ship by an emergency route via the Cape would be to impose upon them a fundamentally different obligation which neither party could, at the time when the contract was made, have dreamed, that the sellers would be required to perform and that, if the parties to the contract had thought of the matter at the time, both, as reasonable men, would have accepted at once that, if the Canal was closed for an indefinite period at a time when the sellers were not in breach for failure to ship earlier, the contract would be off. Justice and reason require that, in these circumstances, both parties should be relieved from their obligations on the happening of the closing of the Canal without default of either party.

This conclusion makes it unnecessary for me to express any concluded opinion on the effect of clause 17. It is sufficient for me to say that, in my opinion, the closing of the Suez Canal as an act of hostilities did, on the facts found, prevent fulfilment of the sellers' obligation to ship, properly construed.

I accordingly answer the questions put in paragraph 4 of the case in the affirmative, with the result that the alternative award stated in paragraph 12 (2) takes effect. The sellers must also have the costs of the argument before me.

Award accordingly.

Solicitors: *Richards, Butler & Co.; Thomas Cooper & Co.*

C. J. E.

[19] (1923) 28 Com.Cas. 1, 18.

[COURT OF CRIMINAL APPEAL.]

REGINA *v.* CHAPMAN.

C. C. A.

1958
July 14, 28.

Devlin, Donovan and Ashworth JJ.

Criminal Law—Abduction—Unmarried girl under eighteen—"Unlawful sexual intercourse"—Meaning—Sexual Offences Act, 1956 (4 & 5 *Eliz.* 2, *c.* 69), *s.* 19 (1).

The words "unlawful sexual intercourse" in section 19 (1) of the Sexual Offences Act, 1956,[1] mean illicit sexual intercourse, that is, intercourse outside the bond of marriage.

APPEAL against conviction.

The appellant, Frank Chapman, a married man with four children, in December, 1957, took an unmarried girl, aged sixteen years and a few months, away from her parents' house at Southampton to Basingstoke. There they stayed at his sister's house, slept together and had intercourse. He then took her to Winchester to the house of another of his sisters, to whom he introduced her as his wife. From Winchester the girl was taken back home by the police. He was charged before Stable J. and a jury at Winchester Assizes with having committed an offence against section 19 of the Sexual Offences Act, 1956. He pleaded not guilty to the charge, but was convicted and sentenced to 18 months' imprisonment on March 24, 1958. Leave to appeal was given by the Court of Criminal Appeal solely for the purpose of enabling the appellant to argue the point of law which he took unsuccessfully before the trial judge, namely, whether the intended intercourse in this case could properly be described as "unlawful" as required by section 19 of the Act of 1956.

I. A. Kennedy for the appellant.
J. H. Inskip for the Crown.

The following cases were cited in argument: *Mogul S.S. Co.* v. *McGregor*[2]; *Hayes* v. *Stevenson*.[3]

Cur. adv. vult.

July 28. DONOVAN J. The judgment I am about to read is the judgment of the court.

The court has already dismissed this appeal, for reasons which we now proceed to give.

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Sexual Offences Act, 1956, s. 19: "(1) It is an offence, subject to the "exception mentioned in this section, "for a person to take an unmarried "girl under the age of eighteen out of "the possession of her parent or guardian against his will, if she is so "taken with the intention that she "shall have unlawful sexual intercourse with men or with a particular "man. (2) A person is not guilty of "an offence under this section because "he takes such a girl out of the "possession of her parent or guardian "as mentioned above, if he believes "her to be of the age of eighteen or "over and has reasonable cause for "the belief."

[2] [1892] A.C. 25; 8 T.L.R. 182.

[3] (1860) 3 L.T. 296.

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[His Lordship stated the facts, read section 19 of the Sexual Offences Act, 1956, and continued:] The appellant's main contention is that the word "unlawful" in section 19 connotes intercourse which is forbidden by law, and that since the girl was over 16 it was not so forbidden in this case, however immoral it was. Alternatively, he says that the section applies only if the girl is taken away for intercourse under circumstances such as would constitute the breach of a covenant in a lease not to create a nuisance, for example, to a house used as a brothel.

It is curious that the point has not apparently arisen before, because the Act of 1956 is a consolidating measure, and there is a long history behind many of its provisions, though not so long behind section 19 itself. The researches of Mr. Kennedy have revealed that in the reign of Philip and Mary, for example, a statute was passed making it an offence to take an unmarried girl under the age of 16 out of the possession and custody and against the will of the father (4 & 5 Philip and Mary, c. 8). No particular intent, however, was specified as an ingredient of the offence.

By the statute 18 Eliz. 1, c. 8, s. 4, it was enacted that if any person should unlawfully and carnally know any woman-child under the age of 10 it should be a felony. It is difficult to suppose that "unlawfully" in this context meant contrary to some positive enactment. One would think that all intercourse with a child under 10 would be unlawful; and on that footing the word would be mere surplusage. The same expression was used when this section was re-enacted in 1828 by 9 Geo. 4, c. 31, s. 17.

Section 49 of the Offences against the Person Act, 1861, made it an offence to have "illicit" carnal connexion with a woman or girl under 21, if procured by false pretences or fraud; and section 50 re-enacted that it should be an offence unlawfully to have carnal knowledge of a girl under 10. The precursor of section 19 of the Act of 1956 is, however, section 7 of the Criminal Law Amendment Act, 1885, which provided that a person commits an offence who takes an unmarried girl under 18 out of the possession and against the will of her parents with the intent that she shall be "unlawfully and carnally known" by any particular man or generally. This is now in substance re-enacted in section 19 of the Act of 1956. No great assistance is to be derived for present purposes from the language used in these earlier statutes, except that it does suggest that the word "unlawfully" in relation to carnal knowledge has not been used with any degree of precision. It would be natural, however, for the framers of a statute, in days when the canon law would be more in their minds than today, to refer to any intercourse outside the bond of matrimony as "unlawful"; and for their successors when drafting consolidating Acts simply to repeat the word without a close consideration of its necessity or precise meaning.

We reject the argument that in section 19 of the Act of 1956 the word "unlawful" connotes intercourse contrary to some positive enactment. The argument, at once, prompts the question why, if the intercourse in question is already positively forbidden, section 19 should do it again. The answer suggested on behalf of the appellant is that under section 19 the law can step in before unlawful intercourse actually occurs and so prevent the mischief. This is perhaps a little imaginative when one considers the circumstances of most abductions; but the answer seems to us to be this: the plain purpose of section 19 is to protect young unmarried girls. That protection would be largely, if not wholly, illusory if in every case it were incumbent on the prosecution to prove that she was taken from her parents for the purpose of intercourse of a kind positively forbidden by some enactment, and not for intercourse not so forbidden. We do not think that such can have been Parliament's intention.

As regards the alternative suggestion that "unlawful" intercourse in section 19 connotes intercourse in a brothel or something of that kind, it is sufficient to observe that to procure a girl to leave her home to become an inmate of or to frequent a brothel, or to become a common prostitute, is made a specific offence by section 22 of the Act, and section 19 is not therefore needed for this purpose.

If the two interpretations suggested for the appellant are rejected, as we think they must be, then the word "unlawful" in section 19 is either surplusage or means "illicit." We do not think it is surplusage, because otherwise a man who took such a girl out of her parents' possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention. In our view, the word simply means "illicit," i.e., outside the bond of marriage. In other words, we take the same view as the trial judge. We think this interpretation accords with the common sense of the matter, and with what we think was the obvious intention of Parliament. It is also reinforced by the alternatives specifically mentioned in sections 17 and 18 of the Act, that is, "with the "intent that she shall marry, or have unlawful intercourse . . ."

There was ample evidence in the present case upon which the jury could find that this girl was taken away by the appellant with the intent that he should have intercourse with her, which was unlawful in the sense which we have determined. As leave to appeal was given, however, to argue the point of law involved, the sentence will run from the date of conviction.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; A. N. Schofield, Town Clerk, Southampton.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1958 *June* 9, 10, 11, 12, 16, 17, 18, 19, 23, 24; *July* 24.

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD. . . . . APPELLANT;

AND

MEYER AND ANOTHER . . . . . RESPONDENTS.

Company—Oppression—Subsidiary company—Minority of independent shareholders—Majority of nominees—Controlling powers used to destroy subsidiary company—Remedy alternative to winding-up—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 210.

By section 210 of the Companies Act, 1948: "(1) Any member "of a company who complains that the affairs of the company are "being conducted in a manner oppressive to some part of the "members (including himself) . . . may make application to the "court by petition for an order under this section. (2) If on any "such petition the court is of opinion—(*a*) that the company's "affairs are being conducted as aforesaid; and (*b*) that to wind up "the company would unfairly prejudice that part of the members, "but otherwise the facts would justify the making of a winding-up "order on the ground that it was just and reasonable that the "company should be wound up, the court may, with a view to "bringing to an end the matters complained of, make such order "as it thinks fit, whether for regulating the conduct of the com-"pany's affairs in future, or for the purchase of the shares of any "members of the company by other members of the company, "or by the company, and, in the case of a purchase by the com-"pany, for the reduction accordingly of the company's capital, or "otherwise."

In 1946 a co-operative wholesale society formed a subsidiary company to enable it to participate in the manufacture and sale of rayon materials and get licences to manufacture rayon cloth, the production of which was then controlled and remained controlled until 1952. The two respondents were appointed joint managing directors of the company, which, so long as cotton control lasted, was dependent on their skill, knowledge and experience and on their connexions with the trade, and, because of these, licences were granted. The company's capital consisted of 20,000 shares of £1 each, 7,900 of which were issued. The respondents acquired 3,450 and 450 respectively, and the society acquired 4,000, appointing as directors three nominees who were also members of its own board. The company traded successfully for several years and earned substantial profits. In 1951 the society sought to purchase from the respondents their shares at less than their true value but the suggestion was rejected. The society dropped the attempt but adopted a policy of transferring the company's business to a new department within its own organization, thereby forcing down the value of the company's shares. The nominee directors, though aware of this policy, did not inform the respondents but promoted the society's plans. In consequence, the company's business came virtually to a standstill and the value of its shares was greatly reduced. In 1953 the respondents presented a petition under section 210 for an order on the society to purchase the whole of their shares at a price based on their previous value or

**Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM and LORD DENNING.

such other price as the court might think fit. It was common ground that at the date of the petition it was just and equitable that the company should be wound up:—

Held, that the society had acted towards the minority shareholders of the company in an oppressive manner, and that this conduct through the nominee directors of the company, who were also directors of the society, amounted to conduct of the affairs of the company, since the transactions of the two could not be separated. The inaction of the nominee directors amounted to a breach of their duties.

Per Viscount Simonds. When a subsidiary company is formed with an independent minority of shareholders, the parent company is under an obligation so to conduct its own affairs as to deal fairly with its subsidiary.

Held, further, that the company was entitled to the relief sought since the purchase of the shares by the society would bring to an end the matters complained of, namely, the oppression. The making of a winding-up order would unfairly prejudice the minority shareholders.

Decision of the First Division of the Court of Session, *sub nom. Meyer* v. *Scottish Textile and Manufacturing Co.*, 1957 S.C. 110; 1957 S.L.T. 250 affirmed.

APPEAL from the First Division of the Court of Session.

This appeal from a unanimous decision of the First Division of the Court of Session (Lord President Clyde, Lord Carmont, Lord Russell and Lord Sorn) concerned the application and scope of section 210 of the Companies Act, 1948, which dealt with "alternative remedy to winding-up in cases of oppression." The interlocutor appealed from, dated March 20, 1957, was pronounced in a petition presented by Dr. George Meyer and Ronald Joseph Lucas, who were the respondents in the present appeal, under section 210, praying for an order on the appellants, Scottish Co-operative Wholesale Society Ltd., for the purchase of the respondents' shares in Scottish Textiles & Manufacturing Co. Ltd.

The facts are stated in their Lordships' opinions.

I. Robertson Q.C. (of the Scottish Bar), *Benjamin Bathurst Q.C.* (of the English Bar) and *A. Johnston Q.C.* (of the Scottish Bar) for the appellant society.

R. Johnston Q.C. and *F. O'Brien* (both of the Scottish Bar) for the respondents.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *Irvin & Johnson Ltd.* v. *Oelojse Fisheries Ltd.*[1]; *In re Hannetta Ltd.*[2] and *Thomas* v. *Thomas.*[3]

The following cases which were not cited in argument were referred to by Lord Denning: *Lowry* v. *Consolidated African*

[1] (1954) (1) S.A. 231.
[2] (1953) Nov. 2 (unreported); see 216 L.T.J. 639.
[3] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582.

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Selection Trust Ltd.[4]; *Hivac Ltd.* v. *Park Royal Scientific Instruments Ltd.*[5]; *Morison, Pollexfen & Blair Ltd.* v. *Walton*[6]; *In re Yenidje Tobacco Co. Ltd.*[7] *and Heydon's Case.*[8]

Their Lordships took time for consideration.

July 24. VISCOUNT SIMONDS. My Lords, in this appeal from an interlocutor of the First Division of the Court of Session I am in such full agreement with their Lordships both in their findings of fact and in their conclusions of law that I do not think it necessary to trouble the House at such length as I otherwise might. But, inasmuch as your Lordships have for the first time to consider a new and important section of the Companies Act, 1948, it is right that I should state my views upon it.

On May 7, 1946, there was incorporated as a private limited company the Scottish Textile and Manufacturing Co. Ltd., which I will call "the company." It had an authorised share capital of £25,000 divided into 25,000 shares of £1 each. Its substantial object was the manufacture and merchanting of rayon fabrics. The respondents, formerly of German but now of British nationality, who had left Germany when the Nazis obtained power in that country, had a large experience and extensive connexions in the continent of Europe in the rayon trade, and one of them, Dr. Meyer, had already in 1945 been appointed textile adviser to the appellant society. Into this trade the society wished to enter and, though they would have preferred to carry it on as a branch of their own business, this was for more than one reason not practicable. The respondents were unwilling to act merely as employees of the society and, since at that time licences had to be obtained for the manufacture of rayon, and were granted only to persons who could satisfy the cotton control authorities that they commanded the necessary skill and experience, it was mutually advantageous to the society and the respondents that a subsidiary company should be formed in which they should both be interested. The company was accordingly formed and 7,900 shares were issued, 4,000 to the society, 3,450 to Meyer, 450 to Lucas. Thus the society had such control as a majority shareholding could give. Moreover, of the five directors of the company three were at all material times nominees of the society, the other two being the respondents who were the managing directors. Nor was there lacking control by the society of a practical sort. For from the outset it was contemplated that, at any rate until a factory could be built or acquired for it, the company should be substantially dependent for its supplies upon the society's mill at Falkland which in 1946 was partially idle. Accordingly, under arrangements with cotton

[4] [1940] A.C. 648; 56 T.L.R. 735; [1940] 2 All E.R. 545.
[5] [1946] Ch. 169; 62 T.L.R. 231; [1946] 1 All E.R. 350.
[6] (1909) May 10 (unreported); see [1915] 1 K.B. 90; [1919] 1 K.B. 457.
[7] [1916] 2 Ch. 426; 32 T.L.R. 709.
[8] (1584) 3 Co.Rep. 7a.

control, the production of a number of looms at Falkland was allocated to the company and the looms were licensed for rayon production. Dr. Meyer made arrangements for the supply of rayon yarn to be used in the manufacture of the finished cloth, the yarn being purchased by the society and invoiced to them at Falkland Mill. There it was woven and the woven cloth sold to the company ready for dyeing and finishing. This was the plan, and from the beginning it flourished greatly.

But, my Lords, it was a plan which demanded the utmost good faith on both sides, and, as your Lordships will see, it was the lack of it on the part of the society which led to this discreditable tale.

I must hark back for a moment to the year 1947. It seems that in March of that year an agreement between the parties was made for what was curiously called a realignment of their shareholding, so that, instead of approximately equal holdings, the society should hold 70 per cent. and the respondents 30 per cent. of the issued capital. That was in March, 1947, but nothing was done to carry the agreement into effect until the year 1951. In November of that year, the company being then apparently very prosperous, the nominee directors, as I will call them, under the instructions of the board of the society raised the question: numerous proposals were put forward, some of which involved the purchase by the society of some of the respondents' shares. It is unnecessary to go into the details of this episode, for in the end nothing was done. The significance of it lay in the fact that the society's representatives adopted the view that they were entitled to acquire at par any shares they might get under the so-called realignment and, upon a refusal of this unjust demand, threatened that the society would liquidate the company if it was not met. This and other threats led to legal advice being sought. The solicitor to the society and the company advised that the shares should be valued and bought at a valuation: they were valued by the company's auditors at no less than £6 0s. 11d. a share and thereafter the society proceeded no further in the matter. It is impossible after reading the voluminous evidence in this case not to see that the society, thus foiled in their attempt to obtain a grossly unfair advantage of the respondents, determined to seize any opportunity of procuring for themselves the benefit of the trade which had been largely built up by their efforts.

It is at this stage convenient to refer to the section of the Act under which the respondents petitioned the court for relief and obtained the order, against which this appeal is brought, that the society should buy their shares in the company at £3 15s. 0d. per share. It is, so far as relevant, as follows:

[His Lordship read section 210 (1) and (2) and continued:] It is common ground that at the date of presentation of the petition on July 13, 1953, it was just and equitable that the

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company should be wound up. It could hardly be denied that to wind up the company would unfairly prejudice the respondents. The only question is whether its affairs were being conducted in a manner oppressive to the respondents and, if so, whether the court ordained the appropriate remedy.

My Lords, as I have already said, I do not propose to rehearse the facts at length. The four learned judges of the First Division, including Lord Carmont who was deputed to take the proof, were unanimously of opinion that the society had conducted the affairs of the company in a manner oppressive to the respondents. Each of them gave a judgment which, I may perhaps be permitted to say, was a careful and exhaustive appraisal of the evidence, and, even if I did not myself come, as I do come, upon an independent reading of it to the same conclusion, I should be reluctant to disturb their findings, particularly as Lord Carmont had the peculiar advantage of seeing the witnesses. It cannot be ignored that, wherever there was any dispute of fact, the testimony of the respondents was preferred to that of the witnesses of the society. Having myself only read the written word, I must say that I was by no means favourably impressed by the evidence of more than one of the latter witnesses.

It is, however, necessary, if section 210 is to be successfully invoked, to show, not only that there has been oppression of the minority shareholders of a company but also that it has been the affairs of the company which have been conducted in an oppressive manner, and it was to this point that a large part of the appellants' argument was directed. I must therefore state in broad outline the course of events which led to the presentation of the petition.

The last event that I mentioned was the failure of the society to acquire at par shares that were worth a far greater sum. This was at a time of the company's great prosperity which, subject to the ups and downs of the textile trade, might be expected to continue. It was, however, followed by a recession in the rayon trade, of which the dates of beginning and ending were a matter of dispute. Such dates cannot be precisely determined and are of no consequence. It is, however, to be noted that it was in the course of it that rayon control came to an end, so that neither the society nor the company any longer depended on the personality of the respondents to get supplies of yarn. It was also in the course of it that the respondent Meyer was anxious to visit Germany with a view to increasing the company's trade in that country but was prevented by his co-directors from doing so. This was undoubtedly the cause of much ill-feeling and was itself a matter of complaint in the original petition, but, as the averment in regard to it was struck out, I say no more about it. During the same period other incidents occurred which aggravated the hostile relations between Meyer and Schofield, the manager of the society's Falkland Mill.

An important consequence of the removal of cotton control was

this. In or about June, 1951, a new department of the society had been formed called the merchant converting department. It was under the control of a Mr. Wand, the manager of the drapery department, and its function was to convert loom state cloth by dyeing, printing and finishing into material for manufacture into garments. It therefore became possible upon the removal of cotton control and upon a revival of the rayon trade for the society to divert to their own converting department the product of their Falkland Mill. It was the fact, as they were well aware, that the company which had throughout been practically tied to them for the greater part of its supplies, would have great difficulty upon a revival of trade in getting them elsewhere. Deliberately they supplied the necessary material to the converting department but, in spite of Meyer's protests, declined to supply the company except at higher and non-competitive prices. An attempt to justify this discrimination was rightly regarded by their Lordships of the First Division as unsatisfactory. I have no doubt that at any rate by the end of 1952 it was the policy of the society by one means or another to destroy the company it had created, knowing that the minority shareholders alone would suffer in that process. But it is, in truth, unnecessary to seek to draw inferences from ambiguous facts. For in January, 1953, a Mr. Robert Taylor, a director of the society and then chairman of the company, had an interview with Meyer and Lucas. He cannot be absolved from a share in the lethal policy of the society but is entitled to what credit may be due for the attempt to make the death as merciful as possible. He told them frankly that the society was out to destroy the company, that they had no chance against such a powerful organisation, and that they should make their peace with the society by offering to sell their shares, and he offered to draft, and, two days later, drafted, a letter for them to send to the society. It is not surprising that Meyer wrote, though not in terms suggested by Taylor, offering on behalf of Lucas and himself to sell their shares at a negotiated price. This letter having been referred to a joint meeting of the society's finance sub-committee and the furnishing sub-committee, those sub-committees met and agreed that the company had served its purpose and should be liquidated, if possible. At about the same time the finance sub-committee interviewed the respondent, who intimated that in their opinion a fair price for the shares was 96s. per share and also that they were prepared after selling their shares to stay on in the service of the company. The same sub-committee recommended that Dr. Meyer should be informed that the society did not wish to accept the offer to sell " at the present time." These recommendations were approved by the board of the society on February 9, 1953, and a letter was duly sent to Meyer informing him of the decision not to accept the offer to sell " at the present time." He was not told and did not learn, until in these proceedings the minute was produced, that the

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society had decided that " the company had served its purpose " and should be liquidated if possible.

At this time the three nominee directors of the company were aware (Taylor by his own confession) of the policy of the society. It is undeniable that persons so placed may find themselves in a difficulty. But in all the evidence I have not been able to find the least trace that they regarded themselves as owing any duty to the company of which they were directors. They were the nominees of the society and, if the society doomed the company to destruction, it was not for them to put out a saving hand. Rather, they were to join in that work, and, when a frank and prompt statement to their co-directors might have enabled them to retrieve its fortunes, they played their part by maintaining silence. That is how they conducted the affairs of the company, and it is impossible to suppose that that was not part of the deliberate policy of the society. As I have said, nominees of a parent company upon the board of a subsidiary company may be placed in a difficult and delicate position. It is, then, the more incumbent on the parent company to behave with scrupulous fairness to the minority shareholders and to avoid imposing upon their nominees the alternative of disregarding their instructions or betraying the interests of the minority. In the present case the society pursued a different course. It was ruthless and unscrupulous in design and it was effective in operation, and, as I have said, it was promoted by the action or inaction of the nominee directors. The company, which might have recovered its former prosperity, had " served its purpose." It could conveniently be liquidated. I have omitted much which reflects no credit on the society and its officers, for I do not want to repeat what has already been said, or to anticipate what will fall from some of your Lordships. I will only mention the final fact that on August 24, 1953 (that is, after the presentation of the petition under section 210) Meyer and Lucas were given three months' notice of termination of their appointments as managing directors, and Mr. Wand, the manager of the society's drapery department, was appointed manager of the company.

My Lords, upon the facts, as I have outlined them and as they appear in greater detail in the judgments of their Lordships of the First Division, it appears to me incontrovertible that the society have behaved to the minority shareholders of the company in a manner which can justly be described as " oppressive." They had the majority power and they exercised their authority in a manner " burdensome, harsh and wrongful "—I take the dictionary meaning of the word. But, it is said, let it be assumed that the society acted in an oppressive manner: yet they did not conduct the affairs of the company in an oppressive manner. My Lords, it may be that the acts of the society of which complaint is made could not be regarded as conduct of the affairs of the company if the society and the company were bodies wholly independent of each other, competitors in the rayon market, and

using against each other such methods of trade warfare as custom permitted. But this is to pursue a false analogy. It is not possible to separate the transactions of the society from those of the company. Every step taken by the latter was determined by the policy of the former. I will give an example of this. I observed that, in the course of the argument before the House, it was suggested that the company had only itself to blame if, through its neglect to get a contract with the society, it failed in a crisis to obtain from the Falkland Mill the supply of cloth that it needed. The short answer is that it was the policy of the society that the affairs of the company should be so conducted and the minority shareholders were content that it should be so. They relied—how unwisely the event proved—upon the good faith of the society, and, in any case, they were impotent to impose their own views. It is just because the society could not only use the ordinary and legitimate weapons of commercial warfare but could also control from within the operations of the company that it is illegitimate to regard the conduct of the company's affairs as a matter for which they had no responsibility. After much consideration of this question, I do not think that my own views could be stated better than in the late Lord President Cooper's words on the first hearing of this case. "In my view," he said,[1] "the section warrants the court in looking at the business "realities of a situation and does not confine them to a narrow "legalistic view. The truth is that, whenever a subsidiary is "formed as in this case with an independent minority of share-"holders, the parent company must, if it is engaged in the same "class of business, accept as a result of having formed such a "subsidiary an obligation so to conduct what are in a sense its "own affairs as to deal fairly with its subsidiary." At the opposite pole to this standard may be put the conduct of a parent company which says: "Our subsidiary company has served its "purpose, which is our purpose. Therefore let it die," and, having thus pronounced sentence, is able to enforce it and does enforce it not only by attack from without but also by support from within. If this section is inept to cover such a case, it will be a dead letter indeed. I have expressed myself strongly in this case because, on the contrary, it appears to me to be a glaring example of precisely the evil which Parliament intended to remedy.

Some criticism was made of the relief given by the order of the court. It was said that only that relief could be given which had as its object and presumably its effect the "bringing to an "end of the matters complained of" and that an order upon the society to purchase the respondents' shares in the company did not satisfy that condition. This argument is without substance. The matter complained of was the oppression of the minority shareholders by the society. They will no longer be

[1] 1954 S.C. 381, 391.

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oppressed and will cease to complain if the society purchase their shares.

Finally, it was said that the court had not properly exercised its discretion in fixing a price of £3 15s. 0d. per share. I see no ground for interfering with this decision. Necessarily a price cannot be scientifically assessed, but I heard no argument, nor had any evidence called to my attention, which suggested that their Lordships had acted on any wrong principle or adopted a measure too generous to the respondents.

The appeal should accordingly, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, I shall refer to the appellant society as "the society," and to Scottish Textile and Manufacturing Co. Ltd. as "the company."

I would accept the finding of fact by the First Division of the Court of Session which the Lord President expressed as follows [2]: "Foiled in their attempt to secure the realignment of the share-"holdings by the purchase of shares from the petitioners at or "about par, the society as a matter of policy thereafter proceeded, "as the subsequent events demonstrated only too clearly, to "endeavour to force down the value of the company's shares, "and in the process in effect to transfer the goodwill of the "company's business to the society itself."

The conduct thus described was, no doubt, oppressive to the company and to the respondents' minority shareholders in the company. It is necessary, however, to consider what was the nature of the steps taken by the society in furtherance of the policy thus described, in order to see whether they bring the case within section 210 of the Companies Act, 1948. The respondents as members of the company, can only succeed if they prove that "the affairs of the company"—and I emphasize the words "of the company"—were "being conducted in a manner oppressive to some part of the members," i.e., to themselves.

I cannot improve upon the learned Lord President's summary of the steps taken by the society and I gratefully adopt it. After referring to the fact that cotton control, and its attendant licensing system, came to an end in June, 1952, the learned Lord President continued [3]:

"The door was then open for the department" (that is, the society's own merchant converting department) "to utilise "Falkland Mill" (which belonged to the society) "for the manu-"facture of rayon and to merchant it themselves—thereby "by-passing the company altogether. The trade and the con-"nexions built up by the company could then be transferred to "the society itself, and the goodwill of the company emptied "of almost any content. No contractual arrangement had been "made between the company and Falkland Mill whereby the "latter undertook to do the weaving for the former. All the

[2] 1957 S.C. 110, 124. [3] Ibid. 122.

"members of the company's board knew that the facilities at "Falkland Mill were essential to the company, and no breach of "any formal contract (as distinct from any question of fair "dealing) was therefore involved in Falkland Mill abandoning "the customer who had employed it for so many years and sub- "stituting the merchant converting department of the society as "its customer. But this is what was in fact done.

"By the autumn of 1952 a temporary trade recession in rayon "had passed; manufacturers were getting busy, and the market "was short of goods. It would not have been easy for the "company in these conditions to secure its manufacturing require- "ments in some other quarters. Now that the barrier created "by the existence of cotton control was removed, this was the "moment selected for the gradual transfer of the society's "interest in the merchanting of rayon from the company to the "merchant converting department."

The Lord President then went on to state that the prices which Falkland Mill quoted for deliveries to the company, and refused to lower, were quite uneconomic for the company and were throughout consistently above market prices. He referred to efforts made by the respondent, Dr. Meyer, to induce Falkland Mill to do business with the company, and continued [4]:

"Nothing came of these approaches, as the mill's prices "remained far too high. Dr. Meyer reported the difficulties to "the board of the company, all the members of which must have "realized how serious an effect these high quotations were having "on the operations of the company. But none of the members "of the board appear to have given him any assistance or "explanation, nor taken any steps to try to remedy the situation "by raising his difficulties at any committee or board meeting of "the society.

"The reason is not far to seek. At the very time when Dr. "Meyer was finding the mill consistently quoting these high "prices to him, the society decided that the merchant converting "department should obtain deliveries of rayon goods from the "Falkland Mill. This was not a mere departmental matter "arranged between managers, but was raised to a policy level by "a direct approach to the merchant converting department by the "manager of Falkland Mill. This is clear on the evidence both "of Mr. Schofield and Mr. Wands. The board of the society "and the society's nominee directors on the board of the company "were, therefore, fully advised of the decision.

"Moreover, the arrangement made was that the mill would "supply woven rayon cloth to the merchant converting depart- "ment and that the mill would 'accept the prices which the "'department was prepared to pay, and see the manager of the "'department about it later if the prices were not economical "'ones.' To start with, experimental orders only were given

[4] 1957 S.C. 110, 123.

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" and accepted. But the manager of the department said in " evidence that he gave Falkland Mill in 1952 enough orders to " keep the looms going for six months. In 1953 and 1954 all the " rayon looms at Falkland were operating for the merchant con- " verting department. This department was buying from the " mill at prices throughout substantially lower than those quoted " by the mill to the company. Moreover, on the costing figures " produced by the respondents, the prices at which the mer- " chant converting department were buying were completely " uneconomic.

" It was contended that there was nothing wrong in the mill " changing over from one customer to another, particularly if " the mill could not arrange a mutually satisfactory price with " the company. This would no doubt be so if both customers " were treated alike, or if it could be maintained that the com- " pany was holding out for an unduly low price. But this was " not the situation. The policy adopted involved starving the " company of deliveries and diverting the production to the " merchant converting department at substantially lower prices " with the understanding that the department would see about " it later if the prices turned out too small. It involved a clear " violation of the elementary principles of fair dealing which " normal commercial standards require."

My Lords, it is, I think, manifest that the oppressive operations so clearly described were all operations in the conduct of the society's affairs, not in the conduct of the company's affairs. The society so conducted its affairs as to oppress the company by shutting it off from its previous source of supply. By so doing the society did, I think, oppress the minority shareholders in the company; but, as I have already pointed out, the respondents can only bring themselves within section 210 of the Act of 1948 if they prove that the affairs of *the company whereof they are members* are being conducted in a manner oppressive to themselves as minority shareholders. They cannot succeed, in my opinion, merely by proving that the affairs of another company are being so conducted, even if that other company holds the majority of the shares in the company whereof the petitioners are members, and nominates the majority of its directors. It may be unfortunate that this form of oppression is not covered by the section; but this is, to my mind, the inevitable result of the words " the affairs of the company are being " conducted." For this reason, my Lords, I should have held the appellant society entitled to succeed if the only evidence of oppression had been evidence that the society deliberately so conducted its own affairs as to cause hardship to the company and to force down the value of its shares, however regrettable such conduct may be, and whether or not it may be actionable.

I turn now to consider whether there is any other ground upon which the present case comes within section 210. Counsel

for the respondents contend that certain directors of the company, nominated by the society and constituting a majority of the company's directors, or the society acting by these directors, "conducted" the affairs of the company "in a manner oppressive" to the respondents. As these directors of the company were also directors of the society, they must, no doubt, be treated as parties to the oppression by the society in the conduct of its own affairs; but I have had great difficulty in arriving at a conclusion upon the question just posed, which is directed only to the affairs of the company. The inaction of these directors at a critical time was pointed out by the Lord President in a passage which I have already quoted from his judgment, and their conduct throughout the relevant period is open to severe criticism. My difficulty is that the conduct of which complaint is made consists rather of sins of omission than of sins of commission, and the day to day affairs of the company appear to have been "conducted" by Dr. Meyer and Mr. Lucas without any active interference by the other directors, except, possibly, on two occasions, which the First Division excluded from proof on the ground of irrelevancy, and except that notice of dismissal, on the ground of saving expense, was given to the respondents after they had presented the present petition. I shall not detain your Lordships by referring in detail to the evidence. Suffice it to say that in the end I have reached the conclusion that there is evidence to justify the view that the affairs of the company were "conducted in a manner oppressive" to the respondents. I am not disposed to give a narrow meaning to these words, having regard to the manifest object of section 210. I am naturally assisted to my conclusion by the fact that the decision of the four learned judges of that Division (including Lord Carmont, who had the advantage of seeing and hearing the witnesses) was unanimous, and by the fact that your Lordships are all of the same opinion.

I agree that this appeal must be dismissed.

LORD KEITH OF AVONHOLM. My Lords, this appeal arises out of a petition presented by the respondents (whom it will be convenient to refer to as "the petitioners") against, inter alios, the appellants (whom I will call "the society") under section 210 of the Companies Act, 1948. Under the procedure of the Court of Session such a petition must be presented to the Inner House and, unless it is remitted to the Outer House, is dealt with and disposed of by the Inner House. Where in the Inner House inquiry into the facts through the mouths of witnesses is thought necessary, evidence is taken in the presence of one of the judges of the Division of the Inner House before whom the petition comes and the hearing on the evidence thereafter takes place before the full Division, including the judge who saw and heard the witnesses. This judge gives no opinion until, after the

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hearing, he takes part in the judgment of the court. This was the procedure followed in the present case.

This petition was presented as far back as July 14, 1953, and after a hearing on relevancy the court, on June 1, 1954, gave a judgment allowing parties a proof before answer of their respective averments, excluding certain averments of the petitioners from probation, and appointed the proof to proceed before Lord Carmont, one of their number. The proof, which commenced on March 25, 1955, was lengthy and voluminous and extended, with many interruptions, for a period of over a year, though the actual number of days occupied was only twelve. After a hearing lasting 13 days, the First Division gave judgment on March 20, 1957, ordaining the society to purchase the shares of the petitioners in the Scottish Textile and Manufacturing Co. Ltd. (hereinafter called " the company ") at a price of £3 15s. per share.

It is difficult to compress the salient features of the case even in broad outline. The petitioners, who were originally of German nationality and are now naturalized British subjects, came to this country in 1939. Through an advertisement Dr. Meyer (one of the petitioners) got into touch with the society in 1945 and got employment from them as textile adviser. He had considerable knowledge of rayon trade and production and conceived the idea that one of the society's weaving mills at Falkland could be profitably employed in the weaving of rayon goods, which would be for it a new line of manufacture. He had great experience of the processes involved and had formulae of his own. He also had trade connexions abroad and he succeeded in establishing relations with the cotton control board who controlled the supply of yarn and manufacture of the cloth. Ultimately it was agreed between the society, Dr. Meyer and the other petitioner Mr. Lucas, who had been associated with Dr. Meyer in the textile business in Germany before the war, that a company should be formed on certain terms for the purpose of manufacturing and dealing in textile fabrics of all descriptions. The company called the Scottish Textile and Manufacturing Co. Ltd. was incorporated on May 7, 1946, with an authorized capital of £25,000 in one pound shares. Thereafter in March, 1947, a second agreement was entered into between the parties which gave effect largely to what had been agreed before the incorporation of the company. The terms of this agreement are important in the light of what follows. I recite the greater part of this agreement:

" FIRST. The share capital of said company is £25,000 " divided into 25,000 shares of £1 each and subject to the provi- " sions of clause 10 hereof the [society] shall subscribe and hold " in their own right up to 17,500 of said shares, [Dr. Meyer] " shall subscribe and hold in his own right up to 5,250 of said " shares and [Mr. Lucas] shall subscribe and hold in his own " right up to 2,250 of said shares the said shares to be allotted " and issued from time to time as the directors of the Scottish " Textile and Manufacturing Co. Ltd. may decide.

"SECOND. The [society] shall purchase as they do hereby "purchase from [Dr. Meyer] all his formulae for the manufac- "ture of textile fabrics for the price of £3,000 which formulae "[Dr. Meyer] has now delivered to the [society] and as to pay- "ment of said price [Dr. Meyer] hereby requests and authorises "the [society] to pay the same to the said Scottish Textile and "Manufacturing Co. Ltd. to be held for his account and applied "towards settlement of the amount due by [Dr. Meyer] to said "company for shares allotted to him.

"THIRD. The [society] in addition to being otherwise en- "titled to use said formulae shall place the same at the disposal "of said Scottish Textile and Manufacturing Co. Ltd. which "shall have full liberty and licence to use the same without "restriction.

"FOURTH. The [society] are entitled and shall continue "to be entitled to nominate three persons to act as directors of "the said Scottish Textile and Manufacturing Co. Ltd. along "with [Dr. Meyer] and [Mr. Lucas] who already have been "elected directors of the company and appointed managing "directors thereof.

. . . . .

"SEVENTH. [Dr. Meyer's and Mr. Lucas's] appointments "as joint managing directors shall subsist for a period of three "years as from May 7, 1946, notwithstanding the date hereof, "and on the expiry of said period unless terminated as herein- "after provided, or unless renewed for a further period, shall "thereafter continue from year to year. [Dr. Meyer's and Mr. "Lucas's] appointments as managing directors or one or other "of them may be terminated by the company on three months' "previous notice in writing being given to that effect, but said "notice shall not prejudice their status to act as ordinary "directors of the company if so elected.

"EIGHTH. [Dr. Meyer and Mr. Lucas] in the perform- "ance of their duties as joint managing directors shall promote "and safeguard the company's interests faithfully and with due "diligence and they shall devote their whole time to the manage- "ment and supervision of the company and in particular they "shall apply without reservation in any respect their specialised "knowledge and experience in the textile trade to the advantage "and benefit of the company. [Dr. Meyer and Mr. Lucas] "shall also use every endeavour to renew or to re-establish all "former trade connections held by them with customers and "agents both in Great Britain and abroad with the purpose of "enhancing and developing the company's interests to the best "extent.

"NINTH. [Dr. Meyer and Mr. Lucas] shall make full dis- "closure for the use benefit and advantage of the company of all "formulae, processes and inventions which they may discover "during the tenure of their appointments. They shall also place "at the disposal and use of the company all patent rights (but

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" excluding trade names previously held by them) of which they " are the present owners or of which they may come to be " possessed during the period of their respective appointments " and that all free of charge. Further [Dr. Meyer and Mr. " Lucas] or either of them bind and oblige themselves not " to transfer or make known to any other person or company " any formulae (including the formulae sold to the [society] by " [Dr. Meyer]) processes, patent rights or inventions held or to " be held by them or to become known to them respectively " without the written consent of the company. Neither shall " they grant licences to any other person or company to use " such formulae, processes, patent rights or inventions without " the written consent of the [society].

" TENTH. In the event of this agreement coming to an end " or in the event of [Dr. Meyer's and Mr. Lucas's] appointments " with said company being terminated from any cause whatever " [Dr. Meyer and Mr. Lucas] shall have the option to sell their " shares in said company to the [society] who shall be bound to " purchase said shares and that at a price to be fixed by the " auditors of the company, said auditors' decision as to price " being final and binding; . . ."

Of the authorized share capital of the company only 7,900 shares were actually issued, of which 4,000 were held by the society, 3,450 by Dr. Meyer, and 450 by Mr. Lucas, all fully paid. This was not according to the proportions contemplated by the agreement, which were in the ratio of 70 to 21 to 9, and although this disproportion was accepted and apparently desired by the society at the beginning, it carried with it later, as will be seen, the seeds of dissension between the society and the petitioners.

To commence operations it was necessary for the company to secure three things—sources of supply of rayon yarn, a licence from cotton control to obtain and weave the yarn, and a place at which to weave it. Dr. Meyer was the chief, if not the sole instrument, in obtaining the first two of these things and he was largely responsible for securing the third. It was contemplated apparently that the company might obtain a factory of its own. On December 29, 1945, before the company was incorporated, the society minuted approval of a recommendation by its furnishing sub-committee " that steps should be taken without delay to rent a suitable factory. When we are successful in obtaining " premises, sub-committee would consider transferring to them " [the company] several looms (say 24) from the linen works at " Falkland. Until such time as a factory becomes available, " production would be carried on at Falkland and elsewhere." At a meeting of the company's board on January 14, 1947, Dr. Meyer reported disappointment that the 24 looms promised at the outset had not been altogether made available and that not more than 10 looms were running on the company's behalf at Falkland. He stressed the fact that " sales total was entirely

"dependent on the supply of cloth received from Falkland and "that the rapid progress of the company was only possible by "means of increased production." The board, which included the society's nominee directors, resolved that the report be accepted and the society be approached to ascertain a date when the company might expect the 24 looms to be in operation on its behalf. Dr. Meyer had in fact by this time obtained a licence from cotton control for these looms, and in March, 1948, he received a revised licence to operate 40 looms at Falkland Mill with effect from March 1, 1948. It is only necessary to add that rayon production at the mill increased from some 23,000 yards in 1946–47 to over 475,000 yards in 1949–50, showing to the mill, in money, an increase from £3,087 to £39,532. The relationship observed between the company and the mill was that Dr. Meyer procured the rayon yarn, which was invoiced to the mill and paid for by the society, and the company paid the mill for the cloth produced for it. The cloth was then dyed, dressed, or otherwise treated and sold by the company to its customers. The idea of setting up an independent factory by the company faded into the background and after a short initial period when the mill was being equipped and its workers trained for rayon production, the mill, on the rayon side, became the company's chief supplier and the mill wove rayon exclusively for the company.

The rest of the story is an unfortunate one. The company prospered for some five years and more, made considerable profits, paid large dividends and accumulated substantial reserves. The rayon looms at Falkland Mill were, during the same period, fully employed. About September, 1951, however, trade began to slacken. To Dr. Meyer it appeared that a recession was approaching, not unconnected with rumours about changes in purchase tax. He wished to hold back supplies ordered from Falkland Mill until he saw how things were going to develop and what customers wanted. This did not please Mr. Schofield, the manager of the mill, who wished to keep his workers engaged on the looms. He had large quantities of yarn in stock obtained through the efforts of Dr. Meyer. I have little doubt that Dr. Meyer's policy was sound, looking to the close relations between the mill and the company. If there was no market for cloth, there was no point in the mill making cloth to be accumulated by the company with no orders in sight and with no money coming in to pay for it. The last bulk order for cloth given by the company to the mill in 1951 was on August 22, 1951, and a dispute arose about the mill continuing to weave to this order, which was not settled till April, 1952. There are indications in the evidence that even before this Mr. Schofield was not particularly well disposed to Dr. Meyer and I think that from this time onwards his attitude unjustifiably hardened against him.

Another event took place about this time which is crucial in this case. The society, stimulated presumably by the prosperity

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of the company and desiring to have a share interest in the company corresponding to what they were entitled to under the original agreement, decided to seek what was described as a proper alignment of the shareholding. The matter came before the society first on August 20, 1951, and their representatives on the company's board were thereafter asked to raise the matter with the company. At a board meeting of the company on November 5, 1951, proposals were continued for further consideration at a meeting to be held on November 22. In the meantime, on November 15 an informal meeting took place between Messrs. Nicholson, Patterson and Dow, the society's nominees on the company's board, and Dr. Meyer and Mr. Lucas, at which Mr. Douglas, the company's secretary, was also present. No minute was taken of this meeting and what transpired can be got only from the evidence given in this case. The judges of the First Division, including Lord Carmont, who saw and heard the witnesses, have accepted the account given by Dr. Meyer and Mr. Lucas, and I find it impossible to take a different view. At the meeting discussion took place on certain proposals for rearrangement of the share capital. The society's representatives insisted that they should acquire the shares at par. Dr. Meyer and Mr. Lucas objected. Discussion got heated and the petitioners say threats were made that if they did not agree the society would liquidate the company. When Dr. Meyer pointed out that this was impossible as the society did not have a three-quarter majority of shareholding, another threat was made that "we will increase "the capital to £25,000 and that will put you in a pickle." The shares of the company were at this date of considerable value. But Mr. Nicholson, one of the society's representatives, who was present at the meeting, agrees that the society was determined to realign the shares at par value.

Following this meeting Dr. Meyer put forward certain proposals in writing to the society, one of which was that 5,100 new shares should be allotted to the society at a value to be ascertained by the auditors of the company. The society resolved to ascertain the decision of the auditors before coming to a decision. The auditors fixed a value of £6 0s. 11d., and on February 18, 1952, the society's board resolved that this be noted and communicated this decision to the company. No further action was ever taken in the matter of realignment of shares by the society. From this date till the end of the tale it is, I think, clear that there existed in the company an atmosphere of hostility on the part of the society's nominees on the board to the petitioners, except in the case of Mr. Taylor, who was not at all times on the board. Even Mr. Schofield seems to have been aware of the fact, and Mr. Taylor recognized it, as will be seen in the events of a year later. It is to be remembered that the directors of the company were personally or as representatives of the society the whole shareholders and that the company was a private company. No appeal to a shareholders' meeting would

alter the situation because the composition of board and shareholders' meeting would be the same.

The recession deepened through the major part of 1952 and manufacture by the mill for the company was non-existent. It would seem likely that the recession was felt by other mills of the society than Falkland Mill, but a veil is drawn over much of the society's and the petitioners' activities in 1952 by the exclusion from probation by the Court of Session of inquiry into certain happenings of which complaint was made by the petitioners in their pleadings.

In June, 1952, cotton control was abolished. This has a material effect on what followed for it left the society free to procure rayon yarn and weave rayon cloth without any licences. No orders had passed from the company to Falkland Mill since 1951. But trade began to pick up in the autumn of 1952 and it is clear that Dr. Meyer was anxious for the mill to resume weaving for the company. The mill itself was at a low ebb. There were no looms working on rayon cloth. It was impossible, however, for Mr. Schofield and Dr. Meyer to come to terms on prices. On November 15, 1952, Dr. Meyer writes to the mill: "We feel most unhappy to place our order somewhere else "while not all of your looms are working. Please do recalculate "your prices again." On November 20, he writes: "We are "very reluctant to place an order with some other firms while "your looms are standing idle," and suggests a small order of some 16,000/17,000 yards "so that we can start business again "and then we can review the position from time to time and "see if we can carry on or not. This would at least, even if we "both worked without any profit at all, mark the beginning." Mr. Schofield quoted prices of 1s. 7d. a yard and 1s. 9½d. a yard for two qualities of cloth, which Dr. Meyer was unable to accept, and on December 4 Dr. Meyer is writing again: "I feel very "sorry indeed that you are unable to accept an order from us "after so many years of co-operation." On the same date Mr. Schofield was writing to the convener of the drapery and furnishing committee of the society, following on an interview with them two days earlier, in which he presents the mill's point of view and concludes: "We are in desperate need of "work for these rayon looms at the present time, and in view "of the foregoing circumstances, we consider that we are "receiving unfair treatment from the Scottish Textile and Manu-"facturing Co. Ltd." This letter was never disclosed to the petitioners though it may well have been known to the company's society nominees and it is, I think, significant that it should have been written at a time when other plans were maturing. Shortly before this date the drapery department of the society had put Mr. Schofield in touch with a department of the society, formed about a year before, known as the merchant converting department. This was a department which carried on a business similar to that of the company. In other words, it

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included the business of buying materials and dyeing, finishing or otherwise processing them for sale to customers. The proposal was that the mill should supply the merchant converting department with a variety of woven goods for converting, including rayon cloth. This idea came to fruition and the first experimental order for rayon cloth was placed on December 11, 1952, and the first bulk order in April, 1953. For the year 1953 £2,167 worth of rayon cloth was supplied by the mill and for the year 1954 £11,776 worth. From transfer invoices produced for these years it is shown that a line of rayon cloth known as 1009 was throughout debited by the mill to the merchant converting department at 1s. 6½d. a yard. The lowest price quoted by Mr. Schofield to the company for this quality on November 24, 1952, was 1s. 7d. a yard, and Dr. Meyer was never able to secure a better quotation. Indeed, much later, in July, 1953, when the society was not prepared to provide cloth for the company except on a weaving commission basis, Mr. Schofield was quoting prices which, on a manufacturing basis, worked out as high as 1s. 9½d. a yard. In December, 1952, when Dr. Meyer was endeavouring to resume business with the mill he was able to buy this quality cloth from other sources at about 1s. 5⅝d. and from a merchant converter at 1s. 6¼d. In these circumstances, the judges of the First Division all took the view that there was a policy on the part of the society to starve the company of cloth, and I do not find it possible, in the circumstances proved, to differ from this view. It is said that during 1953 and 1954 the society made a contribution to the mill to make up for the alleged uneconomic price charged by the mill against the merchant converting department. But, like Lord Sorn, I find the evidence on this very unsatisfactory and unconvincing. The allowance, for which no specific figures can be shown in the books of the society, would seem to have been given, if at all, in respect of the conversion at the mill of looms that had nothing at all to do with the weaving of rayon. Likewise, I discard the costing evidence given to support the prices quoted by Mr. Schofield to the company. It falls with the other evidence and it seems that, in any case, it is based on reduced production at the mill, whereas Dr. Meyer was anxious to get the mill back to a state of full production. I find it difficult to appreciate how, if Dr. Meyer was unable to compete on the mill's quotations in a competitive market, the society would be able to compete, unless it be that the society enjoyed a quasi monopoly in the retail co-operative world.

The next chapter in this unfortunate history opens with the month of January, 1953. In that month Dr. Meyer and Mr. Lucas had a meeting with Mr. Taylor, one of the society's representatives and fellow director, with whom Dr. Meyer was on friendly personal and social relations. Dr. Meyer says Mr. Taylor told him: "They want to get you out and to destroy the "company and you have no chance at all," and Mr. Lucas gave evidence to the same effect. Though Mr. Taylor denies using

this language, Lord Carmont accepts it as true and it certainly fits in with the surrounding facts and circumstances at the time. About the same time Mr. Taylor drafted a letter which he suggested the petitioners should send to the society. It was not sent, as will be seen, but it shows Mr. Taylor's recognition of the existing situation. It opens: "I explained to you [the society's "secretary] on Friday afternoon how unhappy Mr. Lucas and I "have been recently because of the strained relations in our "board." After a reference to the impossibility of re-establishing harmony and offering their shares to the society it proceeds: "You will understand how reluctant we are to take "this step as we have been together associated with Scottish "Textiles since it was formed and we feel we are making it a "success as the records will show. However, it is quite "impossible to carry on in the present atmosphere and this "decision is forced upon us." The letter, dated January 27, 1953, that was sent by Dr. Meyer was couched in somewhat different language and in particular refers to a price to be negotiated for the petitioners' shares. It runs:

"Dear Mr. Stirling,

"In our conversation last Friday we covered all events from "the negotiations regarding the ratio of shareholding up to today. "I explained to you how the very harmonious and friendly "relations which were the guiding principle in all our dealings "started to deteriorate rapidly, and certain actions taken during "the last fifteen months did serious harm to our prosperity and "goodwill.

"Mr. Lucas and myself regret this turn of events most "deeply as it affects not only our livelihood which we built up "with so much pain and labour, but also our sentiment and "affection which we gave wholeheartedly to the co-operative idea "in spirit and actions.

"In spite of all these happenings we still feel that a friendly "settlement is very much desired at least from our side and "we have therefore decided to offer to you our shareholding of "3900 shares at a price to be negotiated between us.

"As we have to take certain important decisions very soon "we would be grateful if you could let us have your views as "soon as possible.

"Yours truly,

"(Sgd. GEORGE MEYER."

Following on this letter Dr. Meyer and Mr. Lucas had a meeting with the society's finance sub-committee, when it was indicated to them that as they wished to give up their interest in the company it might be voluntarily liquidated. Dr. Meyer stated that in that case the goodwill would be lost, that they had had no desire to bring about the present position and they were not going to give up their shares at a liquidation value and, in their opinion they should be paid 96s. a share. They were

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prepared to stay on after selling their shares to the society. At a meeting of the society's board on February 9, 1953, it was minuted that the finance sub-committee and the furnishing committee had met and agreed that the company "had served its "purpose" and should, if possible, be put into voluntary liquidation. The interview with Dr. Meyer and Mr. Lucas was then referred to and a recommendation of the finance sub-committee approved that a reply be sent to Dr. Meyer indicating that the society did not wish to accept his offer to sell the shareholding of Mr. Lucas and himself "at the present time." The purpose which the company had served was plain. It was introducing rayon production to the society, as Mr. Nicholson, one of the society's directors, himself said in evidence.

The petitioners knew nothing of the terms of this minute or of the decision by the two sub-committees that the company had served its purpose. But they did receive a letter dated February 9, 1953, stating that the society did not wish "at the present time" to accept the offer to sell to them the petitioners' shares. After that, according to Dr. Meyer, the petitioners were refused access to the company's books. There followed a letter from the petitioners' solicitors to the society, dated February 19, threatening proceedings under section 210 if the petitioners' shares were not taken over at £6 0s. 11d. a share. The petitioners continued to carry on in the company while attempts were made to resolve the differences between the parties. These, however, came to nothing and the present proceedings were commenced on July 14, 1953. The petitioners still remained with the company. Business, however, was at a low ebb, and on August 24, 1953, the board passed a resolution that their employment as managing directors should terminate on November 30, 1953. They were, I think, still anxious to do what they could to promote the trade of the company and conserve its goodwill and did in fact do some business through other sources than the mill. Under their agreement, they were in any case bound to do so and had been told to do so at a board meeting on August 24, 1953. But excessively high commission weaving rates quoted by Mr. Schofield prevented business on any scale being done with the mill and disputes arose also with regard to a special order where the price charged was of no consequence. The evidence suggests to me the continuance of a policy of hostility to and discouragement of the petitioners by the society. This period produces an instance of support of the petitioners by their fellow directors. Following a meeting of the company's board on October 5, 1953, at which Dr. Meyer complained of the rates quoted by the mill, the company's secretary, on the board's authority, wrote to the society's secretary that "my board would like to inquire if there "is any possibility of the quoted commission weaving charges "from the linen works, Falkland, being reduced," an inquiry which produced a reply in the negative. But this, it seems to me, was but an idle gesture. Litigation was in progress, the

company's conduct was under the scrutiny of the court, and the mill, to the knowledge of the society's representatives, was now in active production for the merchant converting department.

My Lords, all the judges of the First Division take the view that it was the deliberate policy of the society in the later years of its history to depress the value of the company's shares by starving it of supplies and some of them would date the genesis of this policy from the events at the end of 1951 and beginning of 1952, when the society found itself unable to obtain an adjustment of its holding at par. There is, I think, no positive conduct proved to support that view before June, 1952, when cotton control was abolished, but from that date there was an opportunity afforded to the society to pursue such a policy, if they had already entertained it, and I think, as events showed, they did in fact then adopt such a policy. The crucial evidence is that bearing on the trading relations between the mill and the merchant converting department, on the one hand, and the mill and the company, on the other. I have already narrated the facts and, in my opinion, there was started in the autumn of 1952 a policy which took effect in 1953 of utilizing the rayon looms in the mill for the production of cloth for the merchant converting department and shutting off the company from its ordinary source of supply. This was done, not by refusing orders from the company, but by quoting to the company prices at which it could not hope to compete in the selling market. While the society were at pains to show that because of the costs of production they could not quote lower prices, the fact remains that throughout the whole of 1952 and 1953 cloth was being passed from the mill to the merchant converting department at prices which, for at least bookkeeping purposes, were being noted at a figure per yard materially lower than that quoted to the company. It is in evidence that the various trading departments of the society were regarded as separate entities expected to show results on a commercial basis. If that meant that the society was content that the mill should work at a loss in order that the merchant converting department should work at a profit, that only means that it allowed the mill to show favour to the merchant converting department which it could equally have shown to its old customer the company. But I prefer the view that the mill was giving the merchant converting department rayon cloth at prices which it was prepared to quote on an ordinary commercial and competitive basis. I have already dealt with the evidence by which the society seeks to escape this natural inference. Mr. Schofield's own evidence was that he was expected to show a profit at his mill. It is to be remembered that the company was, shortly before, giving full employment to the rayon looms and that, if it had been allowed the opportunity to place orders after the recession passed, there was every reason to think it would do so again. According to the evidence trading prospects were good and the results shown in the production of rayon for the merchant

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converting department bear out this evidence. According to a report of the manager of the drapery department dated August 8, 1953, the cost prices of the mill were based on covering overheads on reduced production and it was anticipated "that if full "productive capacity can be obtained mill cost prices will be "lowered."

From the company's point of view, the position was very serious. It had become dependent on the mill for its supplies of cloth. At the height of its prosperity 94 per cent. of its cloth was obtained from the mill. When trade revived in 1953 other sources on any scale were not available to the company. Manufacturers were busy supplying their regular customers. The position was so minuted by the company as the opinion of the managing directors on August 24, 1953. Mr. Schofield agrees that it was difficult for the company to obtain woven cloth in any quantities outside Falkland and that the company had been tied to Falkland for its rayon cloth. On the other hand, the society had the formulae, connections, and technical knowledge introduced to the mill by the company through Dr. Meyer, and the equipment and workers to manufacture the cloth free from any controls. For practical purposes the mill had started as being, on the rayon weaving side, the company's mill, a substitute for a mill owned by or leased to the company. The rayon weaving looms had now been diverted to the purposes of the society which was enjoying the monopoly which had previously belonged to the company. In the circumstances prevailing, this spelt death to the company. A very significant situation arose in August, 1953, when Dr. Meyer found the commission weaving rates quoted by Mr. Schofield impossible of acceptance. When the secretary of the company wrote on August 19: "As a result of this no produc- "tion is being undertaken on behalf of this company and its "activities are brought almost to a standstill," the society, at a board meeting on August 24, decided to make no reduction in the commission charge. In their minute there appears this passage: "Another factor which affects the situation is that increasing "orders are being received from the merchant converting depart- "ment of the drapery department, and an increasing number of "looms are being devoted to that work so that our manager does "not feel himself pressed to cut his price to the limit as he was "towards the end of last year when work was very difficult to "get."

Lastly, on the facts, it is to be noted that while the society's directors on the company who were also directors of the society knew all that was happening within the society, Dr. Meyer and Mr. Lucas knew nothing apart from what they could infer from the communications, verbal and written, which they had received, with reference to the alignment of the shareholding and the taking over of shares from the petitioners, and the general attitude of the society's directors on the company's board. On the vital matters affecting the company's prosperity known to the

nominee directors these directors remained silent, concealed the facts from the petitioners and took no action and gave no advice helpful to the company. As Lord Sorn put it, their conduct as directors was a negative one to "let the company drift towards "the rocks."

My Lords, if the society could be regarded as an organisation independent of the company and in competition with it, no legal objection could be taken to the actions and policy of the society. Lord Carmont pointed this out in the Court of Session. But that is not the position. In law the society and the company were, it is true, separate legal entities. But they were in the relation of parent and subsidiary companies, the company being formed to run a business for the society which the society could not at the outset have done for itself, unless they could have persuaded Dr. Meyer and Mr. Lucas to become servants of the society. This the petitioners were not prepared to do. The company, through the knowledge, the experience, the connections, the business ability and the energies of the petitioners, had built up a valuable goodwill in which the society shared and which there is no reason to think would not have been maintained, if not increased, with the co-operation of the society. The company was in substance, though not in law, a partnership consisting of the society, Dr. Meyer and Mr. Lucas. Whatever may be the other different legal consequences following on one or other of these forms of combination one result, in my opinion, followed in the present case from the method adopted, which is common to partnership, that there should be the utmost good faith between the constituent members. In partnership the position is clear. As stated in Lindley on Partnership, 11th ed., p. 401: "A partner cannot, without the consent of his co-"partners lawfully carry on for his own benefit, either openly or "secretly, any business in rivalry with the firm to which he "belongs." It may not be possible for the legal remedies that would follow in the case of a partnership to follow here, but the principle has, I think, valuable application to the circumstances of this case.

In these circumstances, I have no doubt the conduct of the society was oppressive. The only question is: was it oppressive in the affairs of the company? At a previous stage of this case when relevancy was under consideration the late Lord President Cooper said [5]: "The truth is that, whenever a subsidiary is "formed as in this case with an independent minority of share-"holders, the parent company must, if it is engaged in the same "class of business, accept as a result of having formed such a "subsidiary an obligation so to conduct what are in a sense its "own affairs as to deal fairly with its subsidiary." I would adopt this statement with this expansion that conducting what are in a sense its own affairs may amount to misconducting the affairs of

[5] 1954 S.C. 381, 391.

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the subsidiary. It is difficult to say that misconduct in the affairs of the subsidiary is not conduct in the affairs of the subsidiary and that, I think, is what Lord Cooper had in mind. Misconduct in the affairs of a company may be passive conduct, neglect of its interests, concealment from the minority of knowledge that it is material for the company to know. That, in my opinion, is what happened here. Nor do I think what I have said is materially different from the views expressed by all their Lordships in the Court of Session. The Lord President considered [6] that there was a policy by the society's nominees on the company's board of "uniform silence" in face of the progressive deterioration in the company's activities; of failure to disclose to the petitioners the explanation of the deterioration; unwillingness to encourage the company to seek other manufacturers, leading to the conclusion that the society was extending to the conduct of the affairs of the company the same policy that was being operated by the society itself. Lord Carmont considered that the society's nominees conducted the affairs of the company oppressively as from the time when being aware of the society's policy they continued to sit on the company's board and to control its affairs. "They could not," he says,[7] "in the circumstance of their "relation to the society be anything other than active, or at best "passive, supporters of the society's policy when dealing with the "company's affairs, and even their continuance in office as "directors of the company put an obstacle in the way of the "minority taking early and perhaps some timeous action to save "the company, or at all events to maintain in whole or in part "the value of the company's shares." Lord Russell held [8] that they "acted in the interests of the society and against the "interests of the company by adopting a policy of masterly "inactivity and allowing the company's trading activities to "decline to vanishing point." Lord Sorn's view was [9] that the society as majority shareholders controlling the company "made "use of its control to ensure that the company remained passive "under the attack and did not have an opportunity to struggle "for its existence"; that they failed in their duty of raising "the "question of looking for another source of supply as an urgent "question of policy"; and that, when the policy of liquidation had been expressly approved by the society's board, "the "nominee directors still did nothing and let the company drift "towards the rocks."

My Lords, these views indicate that the conduct of the society on the company's affairs was negative conduct. That, in a sense, is true, for it is just the other side of the shield from that which displayed the society acting positively to destroy the company. But I cannot think that where directors, having power to do something to save a company, lie back and do nothing, they are not conducting the affairs of the company, perhaps foolishly,

[6] 1957 S.C. 110, 136.
[7] Ibid. 136.
[8] Ibid. 145.
[9] Ibid. 154–155.

perhaps negligently, perhaps with some ulterior object in view. They are certainly conducting the affairs of the company in breach of their duty as directors. In the present case I would go further, for I think that the production of rayon cloth at the mill was an affair of the company and that the society being majority shareholder in the company cannot claim that in diverting this production to itself and obstructing supplies to the company it was acting for itself and not conducting the affairs of the company in a manner unfair and oppressive to the minority shareholders. It was said that the company should have secured its rayon cloth from the mill by a contract. But that is beside the point, looking to the special relationship between the company and the society. A partner who starts a business in competition with the business of the partnership without the knowledge and consent of his partners is acting contrary to the doctrine of utmost good faith between partners. He is also acting in a manner which, I think, may be regarded as oppressive to his partners for he is doing them an injury in their business. In the same way there was here, in my opinion, oppression by the society of the minority shareholders and it was, I consider, oppression in the conduct of the affairs of the company. Oppression under section 210 may take various forms. It suggests, to my mind, as I said in *Elder* v. *Elder and Watson*,[10] a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members. The section introduces a wide power to the court to deal with such a situation in an equitable manner which it did not have in the case of a company prior to the passing of the Act of 1948. The court has here acted, in my opinion, within the powers conferred upon it.

It was said that appeal could not be made to section 210 unless the company had a continuing life ahead of it and here it was clear that the company would have to be wound up. But that means that if oppression is carried to the extent of destruction of the business of the company no recourse can be had to the remedies of the section. This would be to defeat the whole purpose of the section. The present position is due to the oppression and but for the oppression it must be assumed that the company would be an active and presumably flourishing concern. The section is, in my opinion, very apt to meet the situation which has arisen.

It was contended that the value of £3 15s. put upon the shares was excessive. I see no reason for altering this figure. Lord Sorn has, in my opinion, approached this matter on a correct principle, by considering what would have been the value of the shares at the commencement of the proceedings had it not been for the effect of the oppressive conduct of which complaint was made. This is clearly not a matter on which a calculation can be made with mathematical accuracy or by the application

[10] 1952 S.C. 49.

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of strict accounting principles and the figure fixed by the court is well below the figure fixed by the auditors in February, 1952, and the price suggested by Dr. Meyer in February, 1953.

I would dismiss the appeal.

LORD DENNING. My Lords, I had myself prepared a summary of the material facts in this case but, in view of the comprehensive statement by my noble and learned friend, Lord Keith of Avonholm, I will not burden your Lordships with what I had written. I would only say that I am sorry that the events of 1952 were excluded as irrelevant. Dr. Meyer and Mr. Lucas from the very beginning put those events in the forefront of their complaints. They did so in the first letter of their solicitors dated February 19, 1953, and in the original petition lodged on July 14, 1953. The burden of their complaints was that, when there was a recession in 1952 in the rayon trade, they—Dr. Meyer and Mr. Lucas—tried, on behalf of the textile company, to develop trade in other goods: particularly in the export of woollen materials to Germany (where they had valuable trade connections) and in a large export order for £60,000: but that they were thwarted in their efforts by the actions of two of the nominee directors, who tried to get the trade for the Scottish Co-operative Wholesale Society itself. Whether these complaints be true or not your Lordships cannot know—because these allegations were excluded from probation. But your Lordships have, I think, sufficient material to decide the case on the other facts which were proved.

The complaints which were established were, I think, these: The co-operative society set up a competing business. It established its own merchant converting department, engaged in the rayon trade itself, and quoted more favourable terms to its own department than it did to the textile company. It is said that the co-operative society did this with intent to injure the textile company—to depress the value of its shares so that the co-operative society could get them cheap—but I would not myself go as far as this. It seems to me that the co-operative society all the time was seeking to promote its own interests. It was ready in 1946 to enlist the co-operation of Dr. Meyer and Mr. Lucas when they were useful to it—so as to get an introduction into the rayon trade—but it was ready to throw them over when they were no longer useful. By which I mean that it was ready to withdraw all support from them. That was, I think, the state of mind of the co-operative society right from the moment in November, 1951, when Dr. Meyer and Mr. Lucas refused to realign the shares at par. At that time the rayon trade was in a recession and Dr. Meyer and Mr. Lucas were not of so much use to the society as they had been. By the time the rayon trade revived, the controls were off and the co-operative society was able to engage in rayon production itself—and it had no further need of Dr. Meyer

and Mr. Lucas or of the textile company. It had its own department for rayon. So the textile company could go to the wall. It had "served its purpose"—or rather the purpose of the co-operative society—and could be let go into liquidation. The co-operative society had not the voting power to put it into voluntary liquidation. But liquidation might come about by sheer inanition. So it came about that, when Dr. Meyer and Mr. Lucas in January, 1953, offered to sell their shares to the co-operative society at a price to be negotiated (mentioning 96s.), the co-operative society refused "at the present time." The co-operative society thought, perhaps, that, if they waited, sooner or later liquidation would come about, or that terms of purchase would be arranged later more favourable to the co-operative society than paying 96s. a share.

Such being "the matters complained of" by Dr. Meyer and Mr. Lucas, it is said: "Those are all complaints about the "conduct of the co-operative society. How do they touch the "real issue—the manner in which the affairs of the textile com-"pany were being conducted?" The answer is, I think, by their impact on the nominee directors. It must be remembered that we are here concerned with the manner in which the affairs of the textile company were being conducted. That is, with the conduct of those in control of its affairs. They may be some of the directors themselves, or, behind them, a group of shareholders who nominate those directors or whose interests those directors serve. If those persons—the nominee directors or the shareholders behind them—conduct the affairs of the company in a manner oppressive to the other shareholders, the court can intervene to bring an end to the oppression.

What, then, is the position of the nominee directors here? Under the articles of association of the textile company the co-operative society was entitled to nominate three out of the five directors, and it did so. It nominated three of its own directors and they held office, as the articles said, "as nominees" of the co-operative society. These three were therefore at one and the same time directors of the co-operative society—being three out of twelve of that company—and also directors of the textile company—three out of five there. So long as the interests of all concerned were in harmony, there was no difficulty. The nominee directors could do their duty by both companies without embarrassment. But, so soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position. Thus, when the realignment of shareholding was under discussion, the duty of the three directors to the textile company was to get the best possible price for any new issue of its shares (see per Lord Wright in *Lowry* v. *Consolidated African Selection Trust Ltd.*[11]), whereas their duty to the co-operative society was to obtain the new shares at the lowest

[11] [1940] A.C. 648, 679; 56 T.L.R. 735; [1940] 2 All E.R. 545.

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possible price—at par, if they could. Again, when the co-operative society determined to set up its own rayon department, competing with the business of the textile company, the duty of the three directors to the textile company was to do their best to promote its business and to act with complete good faith towards it; and in consequence not to disclose their knowledge of its affairs to a competitor, and not even to work for a competitor, when to do so might operate to the disadvantage of the textile company (see *Hivac Ltd.* v. *Park Royal Scientific Instruments Ltd.*[12]), whereas they were under the self-same duties to the co-operative society. It is plain that, in the circumstances, these three gentlemen could not do their duty by both companies, and they did not do so. They put their duty to the co-operative society above their duty to the textile company in this sense, at least, that they did nothing to defend the interests of the textile company against the conduct of the co-operative society. They probably thought that "as nominees" of the co-operative society their first duty was to the co-operative society. In this they were wrong. By subordinating the interests of the textile company to those of the co-operative society, they conducted the affairs of the textile company in a manner oppressive to the other shareholders.

It is said that these three directors were at most only guilty of inaction—of doing nothing to protect the textile company. But the affairs of a company can, in my opinion, be conducted oppressively by the directors doing nothing to defend its interests when they ought to do something—just as they can conduct its affairs oppressively by doing something injurious to its interests when they ought not to do it.

The question was asked: What could these directors have done? They could, I suggest, at least on behalf of the textile company, have protested against the conduct of the co-operative society. They could have protested against the setting up of a competing business. But then it was said: What good would that have done? Any protest by them would be sure to have been unavailing, seeing that they were in a minority on the board of the co-operative society. The answer is that no one knows whether it would have done any good. They never did protest. And it does not lie in their mouths to say it would have done no good, when they never put it to the test. See the decision of this House in *Morison, Pollexfen & Blair Ltd.* v. *Walton*,[13] but described by Scrutton L.J. in *Coldman* v. *Hill*.[14] Even if they had protested, it might have been a formal gesture, ostensibly correct, but not to be taken seriously.

Your Lordships were referred to *Bell* v. *Lever Brothers Ltd.*[15] where Lord Blanesburgh said that a director of one company was at liberty to become a director also of a rival company.

[12] [1946] Ch. 169; 62 T.L.R. 231; [1946] 1 All E.R. 350.
[13] (1909) May 10 (unreported); see [1915] 1 K.B. 90.
[14] [1919] 1 K.B. 443, 457; 35 T.L.R. 146.
[15] [1932] A.C. 161, 195; 48 T.L.R. 133.

That may have been so at that time. But it is at the risk now of an application under section 210 if he subordinates the interests of the one company to those of the other.

So I would hold that the affairs of the textile company were being conducted in a manner oppressive to Dr. Meyer and Mr. Lucas. The crucial date is, I think, the date on which the petition was lodged—July 14, 1953. If Dr. Meyer and Mr. Lucas had at that time lodged a petition to wind up the company compulsorily, the petition would undoubtedly have been granted. The facts would plainly justify such an order on the ground that it was "just and equitable" that the company should be wound up: see *In re Yenidje Tobacco Co. Ltd.*[16] But such an order would unfairly prejudice Dr. Meyer and Mr. Lucas because they would only recover the break-up value of their shares. So instead of petitioning for a winding-up order, they seek to invoke the new remedy given by section 210 of the Companies Act, 1948. But what is the appropriate remedy? It was said that section 210 only applies as an alternative to winding up and that an order can only be made under section 210 if the company is fit to be kept alive: whereas in this case the business of the company was virtually at an end when the petition was lodged, and there was no point in keeping it alive. If the co-operative society were ordered, in these circumstances, to buy the shares of Dr. Meyer and Mr. Lucas, this would amount, it was said, to an award of damages for past misconduct—which is not the remedy envisaged by section 210.

Now, I quite agree that the words of the section do suggest that the legislature had in mind some remedy whereby the company, instead of being wound up, might continue to operate. But it would be wrong to infer therefrom that the remedy under section 210 is limited to cases where the company is still in active business. The object of the remedy is to bring "to an end the "matters complained of," that is, the oppression, and this can be done even though the business of the company has been brought to a standstill. If a remedy is available when the oppression is so moderate that it only inflicts wounds on the company, whilst leaving it active, so also it should be available when the oppression is so great as to put the company out of action altogether. Even though the oppressor by his oppression brings down the whole edifice—destroying the value of his own shares with those of everyone else—the injured shareholders have, I think, a remedy under section 210.

One of the most useful orders mentioned in the section—which will enable the court to do justice to the injured shareholders—is to order the oppressor to buy their shares at a fair price: and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression. Once the oppressor has bought the shares, the company can survive. It can continue to operate. That is

[16] [1916] 2 Ch. 426; 32 T.L.R. 709.

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a matter for him. It is, no doubt, true that an order of this kind gives to the oppressed shareholders what is in effect money compensation for the injury done to them: but I see no objection to this. The section gives a large discretion to the court and it is well exercised in making an oppressor make compensation to those who have suffered at his hands.

True it is that in this, as in other respects, your Lordships are giving a liberal interpretation to section 210. But it is a new section designed to suppress an acknowledged mischief. When it comes before this House for the first time it is, I believe, in accordance with long precedent—and particularly with the resolution of all the judges in *Heydon's* case [17]—that your Lordships should give such construction as shall advance the remedy. And that is what your Lordships do today.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Martin & Co. for Gray, Muirhead & Carmichael W.S., Edinburgh, and Keyden, Strong & Co., Glasgow; Cole & Matthews for Kinnear & Beatson W.S., Edinburgh, and Wilson, Chalmers & Hendry, Glasgow.*

F. C.

[17] (1584) 3 Co.Rep. 7a.

[QUEEN'S BENCH DIVISION.]

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July 3, 4, 25.
Lord Goddard C.J., Slade and Devlin JJ.

NATIONAL COAL BOARD *v.* GAMBLE.

Criminal Law—Aiding and abetting—Mens rea—Coal Board official allowing overladen lorry to leave colliery—Lorry owner convicted of offence—Whether board guilty of aiding and abetting.

On October 3, 1957, M., the servant of a firm of hauliers, took his lorry to a colliery of the National Coal Board where it was filled with coal from a hopper and was then taken to a weighbridge, where the weighbridge operator H., who was employed by the board, weighed the lorry and its load and told M. that the load was nearly 4 tons overweight. M., saying that he would risk taking the overload, took the weighbridge ticket from H. and left the colliery premises. He was subsequently stopped by the police and his firm were later convicted of contravening the Motor Vehicles (Construction and Use) Regulations, 1955. It appeared that the hauliers were collecting the coal for carriage to a power station of an electricity authority, to whom the Coal Board were bound by contract to supply a bulk quantity of coal. The board were charged with aiding and abetting the firm in the commission of an offence:—

Held (Slade J. dissenting), that the crime of aiding and abetting was committed on proof of a positive act of assistance voluntarily done, and a knowledge of the circumstances constituting the offence, the question of motive was irrelevant; that the property in the coal did not pass to the buyer until the coal was weighed and the weighbridge ticket handed to M., and the completion of the sale

of the coal at that moment by H. as agent for the board, with the knowledge that an offence was going to be committed constituted the board aiders and abettors.

Ackroyds Air Travel Ltd. v. *Director of Public Prosecutions* [1950] 1 All E.R. 933 applied.

Per Slade J. The prosecution must prove that the act or omission on which they rely as constituting the alleged aiding and abetting was done or made with a view to assisting or encouraging the principal offender to commit the offence or, in other words, with the motive of endorsing the commission of the offence.

CASE STATED by Derby justices sitting at Chapel-en-le-Frith.

At a court of summary jurisdiction an information dated November 29, 1957, was preferred by the prosecutor, William Edward Gamble, under section 35 of the Magistrates' Courts Act, 1952, against the National Coal Board that they, on October 3, 1957, at Peak Forest, Derby, unlawfully did aid, abet, counsel and procure H. Wilson & Sons (Mosboro) Ltd. to commit a certain offence, that is to say, to unlawfully use a heavy motor-lorry with six wheels on Chesterfield Road, the sum of the weight transmitted to the road surface by all the wheels of which lorry exceeded 20 tons, contrary to regulations 68 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. The information was heard by the justices on January 30, 1958, when the court convicted the board and fined them £3.

By paragraph 4 of the case the justices found the following facts:

(a) On October 3, 1957, a registered motor-lorry with six wheels was stopped by the police on Chesterfield Road. The gross weight of the lorry and its load was found to be 23 tons 11 cwts. The lorry was driven by one Mallender, the servant or agent of H. Wilson & Sons (Mosboro) Ltd., who owned the lorry. This firm were convicted and fined under regulations 68 and 104 of the regulations of 1955.

(b) The lorry was loaded at the board's premises at Cotes Park Colliery, Somercotes.

(c) The method of loading was as follows: Mallender took his empty vehicle to a hopper at the board's premises which was operated by a servant of the board. Mallender told the hopper operator when to stop loading.

(d) Mallender then took his lorry to the board's weighbridge at the premises to weigh the load.

(e) The weighbridge operator, one Haslam, employed by the board, weighed the lorry and its load and informed Mallender that his load was nearly 4 tons overweight.

(f) Mallender was asked by Haslam whether he intended taking the load and Mallender, after joking about his overload, said that he would risk it and took the weighbridge ticket from Haslam and left the premises.

(g) The weighbridge ticket which was produced by Mallender showed the gross weight of the lorry and its load was 23 tons

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18 cwts., the tare weight of the lorry was 8 tons 6 cwts and the net weight of the coal was 15 tons 12 cwts.

(h) The weighbridge ticket was addressed by the board to the Central Electricity Authority at Carrington.

(i) On the door of the weighbridge ticket office there was a large notice displayed to the effect that owners and drivers of vehicles were warned that the National Coal Board were not responsible for the use of any vehicle on the road which was loaded beyond its authorized capacity.

(j) Off-loading facilities were provided by the colliery and Mallender knew well that he could have off-loaded into another vehicle if he so desired, and that he had done this on previous occasions, but on this occasion he had a new lorry, with which he thought he could drive with an overload without risk.

(k) It was not the practice for the board's servants to give orders of any sort to drivers but they were requested to act in accordance with accepted practice at the colliery in respect of loading and weighing vehicles.

(l) The justices accepted Mallender's evidence that if he had not received his weighbridge ticket he did not think he could have gone off the colliery, but that the Coal Board had no control over his actions. He believed he could do what he liked as regards loading and what he carried on his vehicle and that, if he had not been given a ticket, there would have been trouble, as he knew that he could demand a weighbridge ticket "on rule."

(m) The board did not call evidence and submitted that there was no case to answer.

On the part of the board it was contended that they were under a duty under section 21 of the Weights and Measures Act, 1889, to issue a weighbridge ticket to Mallender, and that if he had left their premises without a ticket and had in due course unloaded the lorry, they would have been guilty of an offence under that Act. That the board had informed the driver that he was overloaded and that, on his evidence, there would have been trouble if Haslam had not issued a ticket. That the board had no direct control over the driver, and that when the handing over of the ticket was otherwise explicable an intention to aid and abet in the commission of an offence must be affirmatively proved, but that the facts, together with the notice displayed by the board, indicated that the board's sole intention was to carry out an administrative act which they were under a legal duty to perform under the Weights and Measures Act, 1889, and that no intention to aid, abet, counsel or procure the commission of the offence had been proved.

On behalf of the prosecutor it was contended that the substantive offence against the regulations of 1955 was one of absolute liability, and that aiding and abetting the commission of an offence against the regulations was also one of absolute liability. That it was only necessary to prove that the board's servants

had full knowledge of the facts which constituted the substantive offence and did acts which assisted the commission of that offence.

The justices drew the following inferences:

1. From the handing over of the weighbridge ticket by Haslam to Mallender the board were bound by contract to supply a certain bulk quantity of coal to the Central Electricity Authority at Carrington Power Station.

2. From the evidence of Mallender that he could have off-loaded some of the coal into another vehicle and then reweighed his lorry, that the coal taken from the hopper into Mallender's lorry remained the property of the board until it had been weighed and offered by Haslam and accepted by Mallender as part of the bulk coal sold to the electricity authority, and until the weighbridge ticket had been handed over in token.

3. From the form in which the weighbridge ticket was drawn, that it was a delivery note and was the authority to H. Wilson & Sons (Mosboro) Ltd. to take and deliver the amount of coal stated therein to the electricity authority.

The justices were of opinion that Haslam, on behalf of the board, could and ought to have refused to hand over to Mallender the ownership of 15 tons 12 cwts. of coal, knowing that Mallender proposed to use this coal in such a way as to break the law, and that the handing over of the weighbridge ticket in these circumstances constituted the offence of aiding and abetting. The board appealed.

John Thompson Q.C. and *Denis Cowley* for the National Coal Board.

P. Ashworth for the prosecutor.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Churchill* v. *Morris* [1]; *Provincial Motor Cab Co. Ltd.* v. *Dunning*.[2]

The following cases referred to in the judgment were not cited in argument: *Reg.* v. *Fretwell* [3]; *Rex* v. *Steane* [4]; *Cook* v. *Stockwell* [5]; *Cafferata* v. *Wilson* [6]; *Pearce* v. *Brooks* [7]; *Wilson* v. *Inyang* [8]; *Johnson* v. *Youden* [9]; *Ferguson* v. *Weaving* [10]; *Wilcox* v. *Jeffery*.[11]

Cur. adv. vult.

July 25. The following judgments were read.

[1] 158 L.T. 255.
[2] [1909] 2 K.B. 599.
[3] (1862) L. & C. 161.
[4] [1947] K.B. 997; 63 T.L.R. 403; [1947] 1 All E.R. 813.
[5] (1915) 84 L.J.Q.B. 2187.
[6] (1936) 53 T.L.R. 34; [1936] 3 All E.R. 149.
[7] (1866) L.R. 1 Ex. 213.
[8] [1951] 2 K.B. 799; [1951] 2 T.L.R. 553; [1951] 2 All E.R. 237.
[9] [1950] 1 K.B. 544; 66 T.L.R. (Pt. 1) 395; [1950] 1 All E.R. 300.
[10] [1951] 1 K.B. 814; [1951] 1 T.L.R. 465; [1951] 1 All E.R. 412.
[11] [1951] W.N. 77; [1951] 1 T.L.R. 706; [1951] 1 All E.R. 464.

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LORD GODDARD C.J. stated the facts and continued. In *Ackroyds Air Travel, Ltd.* v. *Director of Public Prosecutions*,[1] I stated the law with regard to aiding and abetting in this way: "... a person could only be convicted ... as an aider and "abettor if he knew all the circumstances which constituted the "offence. Whether he realized that those circumstances con- "stituted an offence was immaterial. If he knew all the "circumstances and those circumstances constituted the offence "... that was enough to convict him of being an aider and "abettor." Humphreys J. in the same case said[2]: "... it "must be shown that the unlawful act has been committed, and, "therefore, that the offence has been committed, and, further, "that the person charged as an aider and abettor was aware "of the facts sufficiently to enable him to know that the act "was unlawful."

To enable one to decide whether the board were properly convicted as aiders and abettors it seems to me necessary to decide in the first instance when the property in the coal had passed. This was a sale of unascertained goods and the property in those goods passes on a sale when the parties intend it should pass and rules are set out in section 17 of the Sale of Goods Act, 1893, for enabling the court to determine when property passes subject of course to the intention of the buyer and seller. In my opinion it is quite clear that neither side could have intended the property in the coal to pass when it was put from the hopper into the lorry. The quantity would have to be ascertained in order to enable the price to be ascertained. The lorry is then taken to the weighbridge to be weighed and in my opinion no sale takes place whereby the property is passed until the weighing is completed and assented to by the buyer and this is shown by the handing to him and the acceptance by him of a weighbridge ticket. In my opinion, therefore, no property passed until the weighbridge ticket was accepted by Mallender.

As soon as Haslam weighed the coal he knew it was overweight and called Mallender's attention to that fact. From Mallender's answer he knew that Mallender intended to drive the overweighted lorry on the highway and with that knowledge he completed the sale and handed the weight ticket to Mallender whose duty then was to give it to the purchasers, namely, the Central Electricity Authority. Haslam could, in my opinion, have refused to allow the overweight amount of 3 tons 18 cwt. to leave the colliery. No specific amount had been asked for. The board were no doubt bound to deliver coal to the electricity authority under their contract, but were not bound to deliver any particular amount of coal at any particular moment.

The justices drew the inference, and it was not disputed, that the board were bound by contract to supply a bulk quantity of coal to the authority. It was urged on behalf of the board that they had no right to require Mallender to unload the coal

[1] [1950] 1 All E.R. 933, 936. [2] Ibid.

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or rather the excess, but with this I cannot agree. For the reasons I have already given the property had not passed until the delivery was completed and it could only be completed by the weighing and the delivery and acceptance of the ticket.

Suppose a purchaser took his lorry to the hopper and asked for 10 tons of coal or the Coal Board had offered to supply him with 10 tons of coal. Nobody would know how much the hopper delivered until it had been weighed. If it was found that more than 10 tons had been put into the lorry it seems to me beyond question that the board could insist upon the excess being taken out. Here no specific amount was asked for, but the board, by their servant, knew that more had been put into the lorry than could be lawfully carried on the road and with that knowledge completed the sale. In my opinion that amounted to an aiding and abetting of the offence, as Haslam knew Mallender was going there and then to drive the lorry on the highway, in other words, a specific offence was contemplated.

In this connexion I would refer to *Reg.* v. *Bullock*,[3] where *Rex* v. *Lomas*[4] was distinguished. In so holding I do not think an undue burden is placed on the Coal Board; if their weigh-bridge operators are instructed to refuse to give a weight ticket to the driver of a lorry which with its load exceeds the permitted maximum and the latter nevertheless drives away with the load, the board will not have aided or abetted the offence. Compliance with the requirements of the Weights and Measures Act, 1889, can be made by posting the ticket to the purchaser. The Coal Board obviously desire to maintain that the overloading of customers' lorries is no concern of theirs, but in that I cannot agree. The object of the legislation is to protect the roads of the country from damage to which the board would directly contribute if they allow excessive weight to be taken from their premises. In my opinion the justices came to a right decision in point of law and I would dismiss this appeal.

I will now ask Devlin J. to read his judgment and then I will read Slade J.'s dissenting judgment.

DEVLIN J. A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting. I use the word "supplies" to comprehend giving, lending, selling or any other transfer of the right of property. In a sense a man who gives up to a criminal a weapon which the latter has a right to demand from him aids in the commission of the crime as much as if he sold or lent the article. But this has never been held to be aiding in law: see *Rex* v. *Lomas*[5] and *Reg.* v. *Bullock*.[6] The reason, I think, is that in the former case there

[3] [1955] 1 W.L.R. 1; [1955] 1 All E.R. 15.

[4] (1913) 9 Cr.App.R. 220; 30 T.L.R. 125.

[5] 9 Cr.App.R. 220.

[6] [1955] 1 W.L.R. 1.

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is in law a positive act and in the latter only a negative one. In the transfer of property there must be either a physical delivery or a positive act of assent to a taking. But a man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detinue. Thus in law the former act is one of assistance voluntarily given and the latter is only a failure to prevent the commission of the crime by means of a forcible detention, which would not even be justified except in the case of felony. Another way of putting the point is to say that aiding and abetting is a crime that requires proof of mens rea, that is to say, of intention to aid as well as of knowledge of the circumstances, and that proof of the intent involves proof of a positive act of assistance voluntarily done.

These considerations make it necessary to determine at what point the property in the coal passed from the board and what the board's state of knowledge was at that time. If the property had passed before the board knew of the proposed crime, there was nothing they could legally do to prevent the driver of the lorry from taking the overloaded lorry out onto the road. If it had not, then they sold the coal with knowledge that an offence was going to be committed.

The board called no evidence, so that a good deal was left to inference; but the conclusions of fact reached by the magistrates have not been seriously disputed. The board had an instalment contract with the Central Electricity Authority for a supply of coal to be delivered at the colliery into lorries sent by a carrier on behalf of the authority. The quantity of each instalment was not prescribed and the inference is that the board were to deliver and the carrier to receive as much as each lorry could carry (which means of course as much as it could legally and safely carry) until the contract quantity was exhausted. The method of delivery was for the lorry to be loaded by hopper and then to proceed to a weighbridge; there were off-loading facilities if the load was found to be overweight. At the weighbridge a ticket was issued in accordance with the Weights and Measures Act, 1889, s. 21, which provides that where any quantity of coal exceeding 2 cwt. is delivered by means of any vehicle to any purchaser, the seller of the coal shall deliver or send by post to the purchaser or his servant, before any part of the coal is unloaded, a ticket or note in the prescribed form.

On this occasion the carrier's lorry was driven by one Mallender and its maximum legal load (after allowing for the tare weight) was 11 tons 12 cwt. It was loaded at the hopper, Mallender telling the operator when to stop. Mallender then took the lorry to the weighbridge. The weighbridge operator, one Haslam, weighed the lorry and its load and informed Mallender that his load was nearly 4 tons overweight. Haslam asked Mallender whether he intended taking the load and

Mallender said he would risk it; he then took the weighbridge ticket from Haslam and left the colliery.

In these circumstances, prima facie, the property in the coal passed on delivery to the carrier in accordance with rule 5 of section 18 of the Sale of Goods Act, 1893. If the delivery was complete after loading and before weighing, the board had not until after delivery any knowledge that an offence had been committed. But where weighing is necessary for the purpose of the contract, as for example in order to ascertain the price of an instalment, the property does not pass until the weight has been agreed. In *Simmons* v. *Swift* [7] the parties agreed to buy and sell "the bark stacked at Redbrook at £9 5s. per ton." It was held that the property did not pass until the bark had been weighed and the price ascertained. Bayley J. said [8] that the concurrence of the seller in the act of weighing was necessary and he might insist on keeping possession until the bark had been weighed.

It was contended on behalf of the board that Haslam had no option after weighing but to issue the ticket for the amount then in the lorry. I think that this contention is unsound. In the circumstances of this case the loading must be taken as subject to adjustment; otherwise, if the contract were for a limited amount, the seller might make an over-delivery or an under-delivery which could not thereafter be rectified and the carrier might be contractually compelled to carry away a load in excess of that legally permitted. I think that the delivery of the coal was not completed until after the ascertained weight had been assented to and some act was done signifying assent and passing the property. The property passed when Haslam asked Mallender whether he intended to take the load and Mallender said he would risk it and when the mutual assent was, as it were, sealed by the delivery and acceptance of the weighbridge ticket. Haslam could therefore after he knew of the overload have refused to transfer the property in the coal.

This is the conclusion to which the justices came. Mr. Thompson submits on behalf of the board that it does not justify a verdict of guilty of aiding and abetting. He submits, first, that even if knowledge of the illegal purpose had been acquired before delivery began, it would not be sufficient for the verdict; and secondly, that if he is wrong about that, the knowledge was acquired too late, and the board was not guilty of aiding and abetting simply because Haslam failed to stop the process of delivery after it had been initiated.

On his first point Mr. Thompson submits that the furnishing of an article essential to the crime with knowledge of the use to which it is to be put does not of itself constitute aiding and abetting; there must be proved in addition a purpose or motive of the defendant to further the crime or encourage the criminal. Otherwise, he submits, there is no mens rea.

[7] (1826) 5 B. & C. 857. [8] Ibid. 863.

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I have already said that in my judgment there must be proof of intent to aid. I would agree that proof that the article was knowingly supplied is not conclusive evidence of intent to aid. *Reg.* v. *Fretwell* [9] is authority for that. *Rex* v. *Steane*,[10] in which the defendant was charged with having acted during the war with intent to assist the enemy contrary to the Defence Regulations then in force, makes the same point. But prima facie—and *Rex* v. *Steane* makes this clear also—a man is presumed to intend the natural and probable consequences of his acts and the consequence of supplying essential material is that assistance is given to the criminal. It is always open to the defendant, as in *Rex* v. *Steane*, to give evidence of his real intention. But in this case the defence called no evidence. The prima facie presumption is therefore enough to justify the verdict, unless it is the law that some other mental element besides intent is necessary to the offence.

This is what Mr. Thompson argues, and he describes the additional element as the purpose or motive of encouraging the crime. No doubt evidence of an interest in the crime or of an express purpose to assist it will greatly strengthen the case for the prosecution. But an indifference to the result of the crime does not of itself negative abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would be to negative the rule that mens rea is a matter of intent only and does not depend on desire or motive.

The authorities, I think, support this conclusion, though none has been cited to us in which the point has been specifically argued and decided. The Lord Chief Justice has quoted the statement of the law in *Ackroyds Air Travel Ltd.* v. *Director of Public Prosecutions* [11] which is consistent with the results reached in the earlier cases of *Cook* v. *Stockwell* [12] and *Cafferata* v. *Wilson* [13] and with the later case of *Reg.* v. *Bullock*.[14] The same principle has been applied in civil cases where the seller has sued upon a contract for the supply of goods which he knew were to be used for an illegal purpose. In some of the authorities there is a suggestion that he could recover on the contract unless it appeared that in addition to knowledge of the purpose he had an interest in the venture and looked for payment to the proceeds of the crime. But in *Pearce* v. *Brooks* [15] Pollock C.B. stated the law as follows [16]: "I have always considered it as "settled law that any person who contributes to the performance "of an illegal act by supplying a thing with the knowledge that "it is going to be used for that purpose, cannot recover the

[9] (1862) L. & C. 161.
[10] [1947] K.B. 997; 63 T.L.R. 403; [1947] 1 All E.R. 813.
[11] [1950] 1 All E.R. 933.
[12] (1915) 84 L.J.Q.B. 2187.
[13] (1936) 53 T.L.R. 34; [1936] 3 All E.R. 149.
[14] [1955] 1 W.L.R. 1.
[15] (1866) L.R. 1 Ex. 213.
[16] Ibid. 217.

"price of the thing so supplied. If, to create that incapacity, "it was ever considered necessary that the price should be "bargained or expected to be paid out of the fruits of the "illegal act (which I do not stop to examine), that proposition "has been overruled by the cases I have referred to, and has "now ceased to be law."

The case chiefly relied on by Mr. Thompson was *Reg.* v. *Coney*.[17] In that case the defendants were charged with aiding and abetting an illegal prize fight at which they had been present. The judgments all refer to "encouragement," but it would be wrong to conclude from that that proof of encouragement is necessary to every form of aiding and abetting. Presence on the scene of the crime without encouragement or assistance is no aid to the criminal; the supply of essential material is. Moreover, the decision makes it clear that encouragement can be inferred from mere presence. Cave J., who gave the leading judgment, said of the summing-up[18]: "It may mean either that mere "presence unexplained is evidence of encouragement, and so of "guilt, or that mere presence unexplained is conclusive proof of "encouragement, and so of guilt. If the former is the correct "meaning I concur in the law so laid down; if the latter, I am "unable to do so." This dictum seems to me to support the view I have expressed. If voluntary presence is prima facie evidence of encouragement and therefore of aiding and abetting, it appears to me to be a fortiorari that the intentional supply of an essential article must be prima facie evidence of aiding and abetting.

As to Mr. Thompson's alternative point, I have already expressed the view that the facts show an act of assent made by Haslam after knowledge of the proposed illegality and without which the property would not have passed. If some positive act to complete delivery is committed after knowledge of the illegality, the position in law must, I think, be just the same as if the knowledge had been obtained before the delivery had been begun. Of course, it is quite likely that Haslam was confused about the legal position and thought that he was not entitled to withhold the weighbridge ticket. There is no mens rea if the defendant is shown to have a genuine belief in the existence of circumstances which, if true, would negative an intention to aid; see *Wilson* v. *Inyang*.[19] But this argument, which might have been the most cogent available to the defence, cannot now be relied upon, because Haslam was not called to give evidence about what he thought or believed.

The fact that no evidence was called for the defence makes this case a peculiar one. We were told that the board desired to obtain a decision on principle which would enable them to regulate

[17] (1882) 8 Q.B.D. 534.
[18] Ibid.
[19] [1951] 2 K.B. 799; [1951] 2 T.L.R. 553; [1951] 2 All E.R. 237.

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their practice in the future. They therefore accepted responsibility for Haslam's act without going into any questions of vicarious liability; and they called no evidence in order, we were told, that the decision might be given on facts put against them as strongly as might be. What they wished to establish was that responsibility for overloaded lorries rested solely with the carrier and that the sale and delivery of the coal could not, if that was all that could be proved, involve them in a breach of the criminal law. For the reasons I have given I think that the law cannot be so stated and that the appeal should be dismissed.

SLADE J. (read by Lord Goddard C.J.). Before a person can be convicted of aiding and abetting the commission of an offence the prosecution must prove: (a) that he knew the essential matters which constituted the offence (*Johnson* v. *Youden*,[20] *Ferguson* v. *Weaving*[21]) and (b) that with such knowledge he assisted, or at least encouraged, the principal offender to commit the offence.

Mere passive acquiescence is sufficient only, I think, where the alleged aider and abettor has the power to control the offender and is actually present when the offence is committed: for example, the owner of a car sitting alongside his chauffeur when the latter commits an offence.

In my judgment the words " assist " and " encourage " necessarily import motive, i.e., purpose or object. It is not sufficient that the alleged abettor should be proved to have done some act, or to have made some omission, without which the principal offender could not have committed the offence; nor is it sufficient that such act or omission had the effect of facilitating the commission of the offence or that it in fact operated on the mind of the principal offender so as to decide him to commit it. The prosecution must prove that the act or omission upon which they rely as constituting the alleged aiding and abetting was done or made with a view to assisting or encouraging the principal offender to commit the offence or, in other words, with the motive of endorsing the commission of the offence.

The foregoing brings me to the facts found, the inferences drawn and the opinions expressed by the magistrates. Mr. Thompson, who appeared for the National Coal Board, invited the court to identify the board with their servant Haslam and, if the court thought Haslam had aided and abetted Mallender, the lorry driver (who was not the servant of the board) to commit the offence, to treat the board also as being answerable for Haslam's offence. As I have reached the conclusion that there was no evidence upon which the magistrates could find that Haslam had aided and abetted Mallender to commit the offence, I am prepared to deal with the appeal upon the basis of Mr.

[20] [1950] 1 K.B. 544; 66 T.L.R. (Pt. 1) 395; [1950] 1 All E.R. 300.

[21] [1951] 1 K.B. 814; [1951] 1 T.L.R. 465; [1951] 1 All E.R. 412.

Thompson's invitation, though I should have felt doubtful of the court's jurisdiction to do so in a criminal charge had my opinion been otherwise.

I accept the opinion of the magistrates that the property in the coal taken from the hopper and loaded into the lorry did not pass from the board to their customer, the Central Electricity Authority, until Haslam issued the weighbridge ticket to Mallender. It is, I think, clear that Haslam knew the essential matters which constituted Mallender's proposed offence when, but not until, he had weighed the coal. I do not think, however, that Haslam knew that it was the issue of the weigh ticket which operated to pass the property in the coal and thus to complete the sale of the coal to the board's customer, and I regard this consideration as important in considering Haslam's motive in issuing the weigh ticket. It is highly improbable that Haslam was acquainted with the provisions of sections 17 and 18 of the Sale of Goods Act, 1893, for ascertaining the intention of the parties with regard to the passing of the property in the coal, or that he ever applied his mind to the question of the precise moment at which the property in the coal would thereby be deemed to have passed. I will, however, assume against Haslam that such knowledge must be imputed to him. I then ask myself what courses were open to Haslam when he learnt, for the first time (i.e., on seeing the scale register the tare of the vehicle and the weight of the coal as in excess of 20 tons) the essential matters of the offence which he knew that Mallender intended to commit. Two courses only were open to him: (1) to call upon Mallender to off-load the coal, or so much of it as was necessary to reduce the total weight to 20 tons; and to refuse to issue a weigh ticket; or (2) to leave the coal where it was, thereby completing the sale, whereupon he would have to issue the weigh ticket in order to avoid contravening the requirements of section 21 of the Weights and Measures Act, 1889. Haslam chose the second of these alternatives, and it is his adoption of this choice which has been held by the magistrates to constitute the aiding and abetting of Mallender's offence.

If there were any evidence that Haslam's exercise of this choice was inspired by a desire to encourage Mallender to commit the offence (which Haslam knew Mallender intended to commit) I would agree with the magistrates' decision. Some acts or omissions speak for themselves; they are consistent only with a desire to encourage or assist. Other acts or omissions are quite colourless and no sinister inference can legitimately be drawn from them. The motive for these can only be supplied by other conduct, for example, where an otherwise equivocal act is accompanied by words of encouragement to commit the offence.

Mr. Thompson referred us to *Reg.* v. *Coney*,[22] and particularly to the judgment of Hawkins J.[23] *Coney's* case was considered

[22] 8 Q.B.D. 534. [23] Ibid. 557.

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by the Court of Criminal Appeal in *Wilcox* v. *Jeffery*,[24] and both these cases seem to me to emphasize the importance of ascertaining the motive underlying an act or omission relied upon as constituting encouragement to another to commit an offence.

I do not think the magistrates applied their minds to the question whether Haslam issued the weigh ticket and thereby completed the sale for the purpose of, or with a view to, encouraging Mallender to commit the offence, or whether he did so with no such purpose in mind. Indeed, if I am wrong in my view that the words "encourage" and "assist" necessarily import "motive" there is no reason why they should have done so.

None of the facts found by the magistrates are, in my judgment, capable of supporting the inference that Haslam, in making the choice he did, issued the weigh ticket and thereby completed the sale with a view to encouraging Mallender to commit the offence which Mallender informed him he intended to commit. On the contrary, I think the facts so found tend to negative rather than to support any such inference, for example, the large notice displayed by the board on the door of the weighbridge ticket office and the facts found in paragraph 4 (k) and (l) of the case; nor can I see any reason why Haslam should desire to encourage the commission of the offence.

Moreover, if knowledge is not to be imputed to Haslam as to the precise moment when the property in the coal passed to the board's customer, I think Haslam was in a difficult position and may well have thought that he had no right to insist upon the off-loading of the excess coal, that Mallender might well have demurred to any such insistence, and that he, Haslam, could only have enforced his demand by taking the law into his own hands.

For these reasons I think that the question raised by the case should be answered in the negative, and that the conviction of the board should be quashed.

Appeal dismissed.

Solicitors: *Donald H. Haslam for Lawrence C. Jenkins, Nottingham; Kingsford, Dorman & Co. for D. G. Gilman, Derby.*

J. D. P.

[24] [1951] W.N. 77; [1951] 1 T.L.R. 706; [1951] 1 All E.R. 464.

[COURT OF APPEAL.]

In re COLE.
WESTMINSTER BANK LTD. *v.* MOORE AND ANOTHER.

[1957 C. No. 2172.]

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June 9, 10;
July 17.

Lord Evershed M.R., Romer and Ormerod L.JJ.

Charity—Children—Deprived of parents—Devise—Income to be applied "for the general benefit and general welfare" of children in local authority's home—Whether valid charitable trust created—Charitable Uses Act, 1601 (43 *Eliz.* 1, *c.* 4), *preamble—Children and Young Persons Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *ss.* 35, 44, 57, 61, 76—*Children Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *ss.* 1, 12, 15.
Administration of Estates—Payment of debts—Property liable—Mortgaged property—Part specifically devised and part falling into residue—Whether liability apportionable—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 35.

The defendant county council maintained "Southdown House" under the power conferred by section 15 of the Children Act, 1948, as a home for the accommodation of children committed to their care. A testator, by clause 6 of his will, devised to his trustees two freehold houses upon trust to apply the income therefrom "for "the general benefit and general welfare of the children for the "time being in Southdown House . . . as a small token of my "appreciation of the work carried on at such home," with a provision that, if the house should cease to be used, the income should be used at the council's discretion for the "benefit of the children "in other homes for children" carried on under the auspices of the council. At the death of the testator the two specifically devised freeholds were jointly charged together with a third property, which formed part of the residue, to a bank to secure the testator's overdraft which amounted to £2,094 16s. 1d.:—

Held, (1) that, on the true construction of clause 6, the trust thereby created was not intended to enure for the benefit only of the children in the home when the testator died but also for the benefit of future inmates from time to time of the home and, accordingly, that the devise failed unless it was for a charitable purpose.

(2) (Lord Evershed M.R. dissenting) that the gift in clause 6 was not a gift for the endowment or maintenance of Southdown House as a home but that the gift was "for the general benefit and "general welfare" of the children in it and since, on the true construction of that phrase, the income of the devised premises could be applied in ways which were not charitable on any construction of the preamble to the Charitable Uses Act, 1601, the devise in clause 6 was invalid as a charitable gift.

Chichester Diocesan Fund and Board of Finance (Incorporated) v. *Simpson* [1944] A.C. 341; 60 T.L.R. 492; [1944] 2 All E.R. 60 and *Williams' Trustees* v. *Inland Revenue Commissioners* [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513 followed.

Per Romer L.J. I cannot regard the provision of television sets, etc., for the benefit of such persons as juvenile delinquents and refractory children in Southdown House as coming within any conception of charity which is to be found in the preamble. If it were, then I suppose a gift to provide the inmates of a Borstal Institution with amenities would be charitable, which would appear to me to be an impossible contention.

Per Lord Evershed M.R. The inference to be drawn from the preamble is that the care and upbringing of children who for any

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reason have not got the advantage or opportunity of being looked after and brought up by responsible and competent persons, or who could, for these or other reasons, properly be regarded as defenceless or "deprived," are matters which prima facie qualify as charitable purposes.

The decision of Lord Romilly M.R. in *Brownson* v. *Lawrance* (1868) L.R. 6 Eq. 1 and of Harman J. in *In re Biss, Heasman* v. *Biss* [1956] Ch. 243; [1956] 2 W.L.R. 94; [1956] 1 All E.R. 89 that where part of property mortgaged is specifically devised and another part falls into residue a sufficient contrary intention is indicated to exclude the provisions of section 35 (1) of the Administration of Estates Act, 1925,[1] doubted.

Decision of Harman J. affirmed.

Appeal from a decision of Harman J.

The testator, Henry Gibbins Cole, by his will dated December 24, 1952, after appointing the plaintiffs the Westminster Bank Ltd. and H. J. Philcox together with the defendant Frederick Arthur Moore to be his executors and trustees and making certain bequests by clause 6 provided as follows: "I devise my freehold houses 'St. Anton' Meads Road Seaford aforesaid and 'Kinninghall' Meads Road Seaford aforesaid unto the East Sussex County Council upon trust to apply the income arising therefrom or from any substituted investments of the proceeds of sale of the said dwellinghouses for the general benefit and general welfare of the children for the time being in Southdown House Firle Road Seaford aforesaid as a small token of my appreciation of the work carried on at such House. If however Southdown House shall be sold or cease to be utilized as a home for children then I direct that the East Sussex County Council shall apply the income from the said dwellinghouses or any substituted investments at the council's absolute discretion for the benefit of the children in other homes for children carried on under the auspices of the East Sussex County Council I desire that the superintendent for the time being of Southdown House should be consulted with a view to ascertaining his views as to the allocation of the before mentioned income."

By clause 7 the testator gave the residue of his real and personal estate to his trustees upon trust to sell and to hold the net proceeds upon trust after payment of his debts funeral and

[1] Administration of Estates Act, 1925, s. 35 (1): "Where a person dies possessed of, or entitled to . . . an interest in property, which at the time of his death is charged, with the payment of money . . . and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof. (2) Such contrary or other intention shall not be deemed to be signified (*a*) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or (*b*) by a charge of debts upon any such estate; unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge."

testamentary expenses, including the estate duty on " St. Anton " and " Kinninghall," Meads Road, upon trust for the defendant Frederick Arthur Moore absolutely.

The testator died on April 5, 1955. At the date of his death " St. Anton " and " Kinninghall " were charged together with freehold premises known as " Wytham Place," Seaford, by a memorandum of deposit in favour of the Westminster Bank Ltd. to secure money amounting at his death to £2,094 16s. 1d. owing by the testator to the bank.

" Wytham Place " had been sold by the testator's trustees for £6,000. " St. Anton " and " Kinninghall " had been retained. These properties were valued for probate respectively at £1,250 and £1,100.

The Westminster Bank Ltd. and Herbert John Philcox took out this summons asking (1) whether the sum of £2,094 16s. 1d. owing by the testator to the bank at his death ought to be paid wholly out of his residuary estate or ought to be charged rateably on the freehold property; (2) whether the specific devise of " St. Anton " and " Kinninghall " to the East Sussex County Council was a valid charitable devise. The defendants to the summons were the residual legatee, Frederick Arthur Moore, and the East Sussex County Council.

The clerk to the council made an affidavit in which he stated " Southdown House . . . is a home provided and maintained by " the council pursuant to the Children Act, 1948, s. 15, for the " accommodation of children in their care. Such children are " either children received into the care of the council under " section 1 of the said Act or children committed to their care " under the Children and Young Persons Act, 1933, ss. 57, 62, " 63, 64 (as amended), 66 and 67 to which sections of the said " Acts I respectfully ask leave to refer.

" The said home provides accommodation for up to thirty " children of either sex between the ages of five and fifteen. The " said home is used as a short-stay and intermediate home, that " is to say, as a home for children requiring to be cared for for " periods ranging from a few weeks to two years or thereabouts, " and is not intended to serve as a permanent home for young " children who are likely to remain in the council's care until they " reach the age limit under the Children Act, 1948, of eighteen " years or are otherwise likely to be in the council's care for long " periods.

" The staff of the said home consists of a married couple who " are in charge of the said home and two female assistants, who " all reside in the said home, together with non-resident domestic " staff. The children in the said home attend the usual local " schools. No more education is provided in the said home than " would be provided by parents in a normal domestic home, to " which it is the object of the council to make the said home " approximate as nearly as possible.

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"The cost of providing and maintaining the said home is provided partly from grants out of moneys provided by Parliament, partly from the general rate fund of the administrative county of East Sussex and partly from contributions received from parents under the Children Act, 1948, ss. 23 and 24, and the Children and Young Persons Act, 1933, s. 86, as amended."

Harman J. declared that the whole of the sum of £2,094 16s. 1d. owing by the testator to the Westminster Bank Ltd. ought to be paid wholly out of the proceeds of sale of Wytham Place. He further held that the devise of "St. Anton" and "Kinninghall" failed.

The East Sussex County Council appealed against that part of the decision which held that the devise of "St. Anton" and "Kinninghall" failed. The defendant, Frederick Arthur Moore, cross-appealed against the declaration that the whole of the sum of £2,094 16s. 1d. was payable out of the proceeds of sale of Wytham Place and asked that it might be declared that the whole of that sum ought to be charged rateably on the three freehold properties charged.

Denys Buckley for the East Sussex County Council.
W. J. C. Tonge for the defendant, Frederick Arthur Moore.
Christopher Slade for the plaintiffs.

The following cases were referred to in argument, which are not mentioned in the judgments: *In re Clarke* [2]; *Attorney-General* v. *Bushby* [3]; *Attorney-General* v. *Duke of Northumberland* [4]; *Inland Revenue Commissioners* v. *Baddeley* [5]; *Commissioners for the Special Purposes of Income Tax* v. *Pemsel* [6]; *In re Turner* [7]; *Hensman* v. *Fryer* [8]; *Knight* v. *Davis* [9]; *Bothamley* v. *Sherson*.[10]

Cur. adv. vult.

July 17. The following judgments were read:

LORD EVERSHED M.R. I will ask Romer L.J. to deliver the first judgment.

ROMER L.J. This is an appeal from an order of Harman J. dated December 5, 1957, whereby he made a declaration as to the manner in which certain charges created in favour of the Westminster Bank Ltd. by the testator during his lifetime should be borne, and a further declaration that a specific devise contained in clause 6 of the testator's will failed and fell into residue. The defendants, the East Sussex County Council, appeal against the

[2] [1901] 2 Ch. 110; 17 T.L.R. 479.
[3] (1857) 24 Beav. 299.
[4] (1889) 5 T.L.R. 237, 719.
[5] [1955] A.C. 572; [1955] 2 W.L.R. 553; [1955] 1 All E.R. 523.
[6] [1891] A.C. 531; 7 T.L.R. 657.
[7] [1938] Ch. 593.
[8] (1867) L.R. 3 Ch. 420.
[9] (1833) 3 Myl. & K. 358.
[10] (1875) L.R. 20 Eq. 304.

second of these declarations, and a cross-notice of appeal has been served by the defendant Moore against the first declaration. The cross-notice only arises for decision if this court reverses the judge's declaration as to the invalidity of the specific devise, and I accordingly propose to consider that question first. [His Lordship read clauses 6 and 7 of the will and continued.]

The testator died on April 5, 1955, and probate of his will was granted to the plaintiffs and the defendant Moore out of the District Probate Registry at Lewes on September 28, 1955. On July 16, 1957, the plaintiffs issued an originating summons asking for directions as to the charges created by the testator as hereinbefore mentioned, and also asking whether the specific devise contained in clause 6 of the will was a valid charitable devise or whether it failed and fell into residue.

The first point which arises on this second question is whether the devise in clause 6 " for the general benefit and general welfare " of the children for the time being in Southdown House " was intended to enure for the benefit only of the children who were in the home when the testator died or for the benefit of future inmates from time to time as well. It is perfectly clear to me that the latter is the true view. The words " for the time being " sufficiently show this in themselves, but when one adds the consideration that the testator was directing the application of income and not of capital, and the fact that the home was only intended to provide temporary accommodation for the children received in it, no room, in my judgment, is left for doubt.

On this view of the matter, then, the devise fails unless it was for a charitable purpose. The purposes for which Southdown House is carried on are stated in the affidavit of the clerk of the East Sussex Council. [His Lordship read the relevant passages in the affidavit and continued:] In order to ascertain the classes or categories of children whom the council have to receive into the home reference must be made to the Children Act, 1948, and the Children and Young Persons Act, 1933. By section 1 of the former Act local authorities have to receive children under 17 (though the age limit in Southdown House is 15) who have no parent or guardian or whose parents or guardian have abandoned them; those whose parents or guardians are for various reasons prevented from providing for their proper accommodation, maintenance and upbringing; and in either case if it appears to the local authority that its intervention is necessary in the interests of the welfare of the child. Section 11 provides that Part II of the Act relates to the powers and duties of local authorities in relation to children received by them into their care under section 1 of the Act and (among others) children who by an order of any court under the Act of 1933 have been committed to their care as a fit person. By section 15 local authorities have to provide homes as therein mentioned. Under section 57 of the Act of 1933 any court by or before which a child or young person is found guilty of an offence punishable in the case of an adult

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with imprisonment shall have power to commit him to the care of "a fit person" (which, by section 76, includes a local authority). By section 62 juvenile courts may commit a child or young person in need of care and protection to the care of "a fit "person." The expression "in need of care and protection" in relation to children is defined by section 61 of the Act and includes (among others) those who are exposed to moral danger or are beyond the control of their parents, and those against whom certain offences have been committed (see also sections 63 and 64). I think that the sections to which I have referred sufficiently indicate the kind of children who can and must be received into such homes as Southdown House; and, in relation to such children, the local authority (by virtue of section 75 (4)) is to have the same rights and powers and be subject to the same liabilities in respect of their maintenance as if it were their parent.

Mr. Buckley, for the Attorney-General, contended before us, as he had contended before the judge, that the devise under clause 6 of the will is within the spirit and intendment of the preamble to the Charitable Uses Act, 1601. The judge rejected the contention. According to the note we have of Harman J.'s judgment, the judge said that the children referred to in the relevant statutory provisions were not "impotent" nor "orphans," that the reference in the preamble to the "payment "of fifteens" had no application and that Southdown House was not a "house of correction." Mr. Buckley submitted to us that the gift should be upheld on the ground that the children in question are either orphans or in a position similar to that of orphans in that, having regard to their peculiar circumstances, they need care and attention which they cannot provide for themselves, but which are provided for them by the home. Their position, he said, is analogous to that of old people, and he submitted further that it would involve no misuse of language to describe them as "impotent." For these reasons he submitted that they came within the sense of the statute.

Now it may be (I say no more) that a gift for the endowment or maintenance of such a home as Southdown House would qualify as a valid charitable trust. That, however, is not the gift with which we are concerned. The devise in question is not to or for the benefit of Southdown House but "for the general "benefit and general welfare" of the children for the time being in it; and it appears to me that some at least of the argument before us was addressed to an issue which does not arise.

It is, of course, clear beyond controversy that if property is vested in trustees upon trust to apply the income for purposes, some of which are charitable and some of which are not, and the trust involves a perpetuity, then the whole gift fails; and none the less because the trustees do in fact apply the income to the specified charitable objects to the exclusion of those which are not charitable. A recent example of this rule is to be found in

the well-known case of *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson*.[1]

The question then, as it seems to me, is whether the East Sussex County Council can, within the terms of their trust under clause 6 of the testator's will, apply the income of the devised properties to purposes which are not charitable, or whether the trust confines them to a charitable application of the income. In my judgment, it is reasonably clear that the income could be applied "for the general benefit and general welfare of the "children" in many ways that could not on any legitimate construction of the Statute of Elizabeth be regarded as charitable. I will take only one illustration. It is permissible to suppose that at any given time all or a considerable proportion of the children in the home may consist of juvenile delinquents, children who are beyond their parents' control and children who have been exposed to moral danger. It would appear to me that the provision of a television set, or a gramophone and records and the like, might well be regarded as being for the general benefit (which I take to mean benefit in a general way) of such children, and that some of the devised income could be applied to the provision of such amenities without any breach of trust being committed by the council. It is quite true that the illustrations or examples which are given in the preamble to the Act of 1601 are not exhaustive, and a gift will be valid if it comes within the spirit and intendment of the statute: *Williams' Trustees* v. *Inland Revenue Commissioners*.[2] Nevertheless, I cannot regard the provision of television sets, etc., for the benefit of such persons as juvenile delinquents and refractory children in Southdown House as coming within any conception of charity which is to be found in the preamble. If it were, then I suppose a gift to provide the inmates of a Borstal Institution with amenities would be charitable, which would appear to me to be an impossible contention.

Mr. Buckley sought to avoid this conclusion by pointing to the reason of the devise as expressed by the testator, namely, "as a "small token of my appreciation of the work carried on at such "House." This language does not, however, confine the application of the income to the carrying on of the work nor narrow the manner in which the council can properly deal with the income. Mr. Buckley also relied on the testator's desire, stated at the end of clause 6, "that the superintendent for the time "being of Southdown House should be consulted with a view to "ascertaining his views as to the allocation of the before "mentioned income." Mr. Buckley suggested that the superintendent would only approve expenditure which was calculated to promote the physical well-being or moral welfare of the children, and that such expenditure would be for a charitable purpose. Without expressing any view as to whether it would or not, I do

[1] [1944] A.C. 341; 60 T.L.R. 492; [1944] 2 All E.R. 60.

[2] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.

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not think that Mr. Buckley's point sufficiently meets the difficulty; for apart from the fact that the council would not necessarily be bound by the superintendent's views, I see no reason why he should not recommend or approve of an expenditure on mere amenities, if they were calculated to amuse and interest the children under his charge.

Accordingly, though for reasons which are somewhat different from those on which the judge founded his decision, I am of opinion that the devise in clause 6 of the will is invalid. On this view of the case it becomes unnecessary to consider or decide the point raised by the defendant Moore as residuary legatee on his cross-appeal. That question arises from the fact that by a memorandum of deposit dated November 24, 1952, the testator charged the two properties comprised in clause 6 of his will with the debt due by him to the Westminster Bank Ltd. By a memorandum of deposit dated November 25, 1952, the testator charged another freehold dwelling-house known as Wytham Place, Seaford, with the same debt. At his death the testator was indebted to the bank in the sum of about £2,094, which was charged on these three properties. The two specifically devised properties are still retained by the executors, and one of them was valued for probate purposes at £1,250 and the other at £1,100. Wytham Place, which formed part of the residuary estate, was sold by the executors for £6,000, and a question arose as to how the charge on the three properties should be borne. Harman J., following a previous decision of his own in *In re Biss* [3] made a declaration that the whole of the sum charged on the properties ought to be paid wholly out of the proceeds of sale of Wytham Place. By his cross-notice of appeal Moore asks that, in the event of the main appeal succeeding, a declaration should be made that the whole of the sum secured ought to be charged rateably upon the three freehold properties in proportion to their respective values. As in my judgment the council's appeal does not succeed, this point does not arise. I desire, however, to keep open, until it arises as an issue in some future case, the question whether the decision of the judge in *In re Biss* [3] and his corresponding decision in the present case were correct. I would dismiss the appeal.

ORMEROD L.J. I agree with Romer L.J. that this appeal should be dismissed, and largely for the same reasons.

Mr. Buckley argued the case before the judge, and indeed before this court, on the basis that the gift in question was really a gift for the endowment of Southdown House, and that such a gift would be within the spirit and intendment of the preamble to the Charitable Uses Act, 1601, and therefore valid as a charitable trust. It appears from the note which is available of Harman J.'s judgment that he rejected this contention on the ground that the children who, by reason of the various relevant statutory provisions, might be committed to the care of the home

[3] [1956] Ch. 243; [1956] 2 W.L.R. 94; [1956] 1 All E.R. 89.

did not of necessity come within any of the classes referred to in the preamble, and that Southdown House was not a home of correction, and he came to the conclusion that the devise was not a charitable gift and, as it tended to a perpetuity, was therefore bad.

The question emerged before this court in the course of the argument whether, on a proper construction of clause 6 of the will, the gift should be treated as one for the endowment or maintenance of Southdown House or as one for the benefit of the children for the time being committed to the care of those in charge of the home. The gift is one of income to be applied "for the "general benefit and general welfare of the children for the time "being in Southdown House." The fact that it is a gift of income and not capital, and is to be applied for the benefit and welfare of the children "for the time being" in the house, in my judgment, points strongly to the view that the gift was not intended to be for the endowment or maintenance of the home. It appears to be a fund intended to provide additional amenities for the children from time to time in the home which would not, or might not, in the ordinary way be provided for them by the local authority in the performance of their duties under the relevant statutory provisions. If this be the proper construction to put upon clause 6 of the will, it is unnecessary to decide whether a gift for the endowment or maintenance of Southdown House would be within the "spirit and intendment" of the Charitable Uses Act, and I express no view upon it.

The question which does remain is whether the gift, on the construction of the clause which I believe to be the right one, can be regarded as charitable. In my view it cannot be so regarded. There appear to be many ways in which the money in question can be applied which would be for the welfare and benefit of the children, and therefore within the terms of the gift, but would not be charitable gifts in the legal sense. In these circumstances, in my judgment, the gift is invalid; and I would dismiss the appeal.

LORD EVERSHED M.R. I have the misfortune to have arrived (I need not say, with very great diffidence) at a conclusion different from that which has commended itself to my brethren and to Harman J. I agree with them in rejecting Mr. Buckley's alternative suggestion that the gift was an absolute gift to those children whose chance it was to be at Southdown House at the moment of the testator's death. Mr. Buckley will, I hope, forgive me if I say no more upon an argument which (having regard to the language used by the testator) has seemed to me wholly untenable. But I have in the end formed the view that the gift of the income of "St. Anton" and "Kinninghall" "for the "general benefit and general welfare of the children for the time "being in Southdown House" ought to be regarded as a good charitable gift.

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The conditions to be satisfied by a gift claiming to qualify as charitable are easy enough to state. The purposes of the donor must have the necessary public quality: and they must have the charitable character derived from the "spirit and intendment" of the preamble to the statute of the first Elizabeth. No question arises in the present case as to the public quality of the relevant disposition. But can its purposes be discerned to fall within the spirit and intendment of the preamble?

The problem, as I have said, is easy to state. The difficulty is, as it has so often been found to be in the numerous cases that have come before the courts, in the solution. It is not now in doubt that the scope or idea of "charity," which the examples in the preamble illustrate, is not limited to those examples or to other dispositions merely analogous to them (see *In re Strakosch* [4]). "Spirit and intendment" comprehend, as I understand it, all dispositions in which is discerned the essential "charitable" characteristic possessed in common by all the preamble's examples. Notwithstanding the passage of three centuries, during which the courts have been able to attach the charitable label to large numbers and varieties of dispositions (and to reject the claim to qualify in no less a number of cases), the underlying idea seems to remain, at times, as elusive as ever. The truth may be that the possible variations of expressed intention by testators and settlors are as the sands of the sea, and that no catalogue of illustrations, however long, can exhaust or confine charity's scope. Moreover, the spirit and intendment of the preamble, as of any collocation of words, may fairly be understood differently by different minds. So in this instance it has seemed to me, with due regard to the opposite conclusions of my brethren and Harman J., that the spirit and intendment of the Elizabethan statute is such as to cover the present case.

I agree with Harman J. that no useful clue can in the present case be derived from the word "impotent" in the trilogy "aged, impotent and poor." But Harman J., according to the note of his judgment, thought equally irrelevant the reference to preferment of orphans, since the children in the present case were not, or were not necessarily, orphans, and because by the word "preferment" was meant apprenticeship. But, in my judgment, this view involves a restriction of the class of charitable purposes to those that are, at best, strictly analogous to the illustrations stated in the preamble; and I do not understand the scope of charity to be so confined. In my judgment, the inference to be drawn from references such as those to the education and preferment of orphans, to schools of learning and free schools, and (perhaps also) to the marriage of poor maids; and the general emphasis in favour of gifts to and for persons suffering from disability and incapacity of various kinds, is that the care and upbringing of children who for any reason have not got the

[4] [1949] Ch. 529; 65 T.L.R. 383; [1949] 2 All E.R. 6.

advantage or opportunity of being looked after and brought up by responsible and competent persons, or who could, for these or other reasons, properly be regarded as defenceless or "deprived," are matters which prima facie qualify as charitable purposes. It was not doubted during the argument that gifts directed to the prevention of cruelty to children would be charitable: and the charitable qualification of such gifts depends, as I think, on the considerations which I have just stated rather than on the ethical or improving notion of such an activity as it would be in the case, for example, of a gift for the prevention of cruelty to animals. Thus, it would appear to me that a trust established during the last century (that is, before Parliament had imposed any duty of care for children on local authorities) for the purposes of the protection or upbringing of children in the parish or town of X, who, owing to the death, incapacity or unfitness of their parents or otherwise, could not be properly protected or brought up, would have been held charitable. If I am right so far, then the charitable nature of such purposes is not displaced merely by the circumstance that their execution is made by Act of Parliament a duty of local authorities, any more than the care of the sick and maimed has ceased to be a charitable purpose by reason of the so-called nationalisation of hospitals. (See, for example, *In re Hutchinson's Will Trusts* [5] and cases there cited.)

That, however, is not the end of the matter. The gift here is expressed to be "for the general benefit and general welfare of "the children . . . in Southdown House," and it is coupled with an expression of desire that the superintendent of Southdown House should be consulted "with a view to ascertaining his views "as to the allocation of the before-mentioned income." The form of gift raises, therefore, two further questions, namely: (1) what exactly are the purposes for which, and the manner in which, the institution known as Southdown House is carried on; and (2) even if the answer to the first question is such that the furtherance of the purposes and activities of Southdown House is prima facie charitable, does the phrase "for the general benefit and general "welfare of the children" cover application of income of the fund which would extend beyond the statutory duties of the local authority in conducting the home, or which, for this or other reasons, would themselves be non-charitable?

The authority for the East Sussex County Council's activities as regards Southdown House is derived from section 15 of the Children Act, 1948, which, by subsection (1), empowers a local authority to "provide, equip and maintain . . . homes for the accom-"modation of children in their care." Subsection (4) empowers the Home Secretary to make regulations as to the conduct of such homes; and, although no such regulations were referred to before us, it is to be noted that the regulations contemplated are directed to "securing the welfare" of the children in the homes with

[5] [1953] Ch. 387; [1953] 2 W.L.R. 872; [1953] 1 All E.R. 996.

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particular regard to such matters as accommodation, equipment and religious upbringing.

Section 15 of the Act of 1948 is in Part II of the Act, which (by section 11) is expressed to relate to the powers and duties of local authorities in relation to children received by them into their care under section 1 of the Act of 1948, and children who, by an order of any court under the Children and Young Persons Act, 1933, have been committed to the care of the local authority "as a fit person."

Section 1 of the Act of 1948 imposes a duty on local authorities to receive into their care children of the classes mentioned in the section, and (by subsection (2)) to keep them in their care so long as the children's "welfare" appears so to require. The classes of children referred to are those of children (appearing to be not more than 17) who have no parents or guardians or have been abandoned, and those whose parents or guardians are prevented by incapacity or other circumstances from "providing for [their] "proper accommodation, maintenance and upbringing." Finally, as regards the Act of 1948, section 12 requires a local authority to exercise their powers with respect to any child in their care "so "as to further his best interests, and to afford him opportunity "for the proper development of his character and abilities."

The Children and Young Persons Act, 1933, is expressed as a consolidating Act concerned with persons under 18, and is (putting the matter generally) designed to protect such young persons against cruelty and exposure to moral and physical danger, and also in relation to criminal and summary proceedings. The inclusion of local authorities in the category of "fit person" is provided by section 76, which imposes, accordingly, on local authorities the duty of undertaking the care of children.

Thus, section 35 requires the appropriate local authority to be notified when a child is brought before any court on an alleged offence or as being "in need of care or protection"; and by section 44 every court dealing with a child is to have regard to its "welfare" and in all proper cases to "take steps for removing "him from undesirable surroundings, and for securing that proper "provision is made for his education and training." There follow provisions for the establishment of juvenile courts, and by section 57 power is conferred on courts in the case of a child found guilty of an offence "punishable in the case of an adult with "imprisonment . . . to commit him to the care of a fit person."

Section 61 defines the meaning of the phrase child "in need "of care or protection"; that is to say (briefly), (1) a child who, having no parent or guardian or whose parent or guardian is unfit, is falling into bad associations, exposed to moral danger, or beyond control: and (2) a child against whom incest or other like offences have been or may be committed. Section 62 empowers a juvenile court to commit a child in need of care and protection to the care of a "fit person": and by section 64 a parent or guardian of an uncontrollable child is empowered to bring such

child before a juvenile court for an order for the child's commitment to the care of a fit person. Finally, by section 75 (4) a fit person to whom a child has been committed has, in regard to that child, while the order is in force, the powers and duties of a parent. It is, however, made clear in this Act, as it is also made clear in the Act of 1948, that these powers and duties of a local authority are without prejudice to the obligation of a parent or guardian to contribute to the child's maintenance.

My summary of the complicated provisions of the two relevant Acts is necessarily incomplete but, I hope, not inadequate. It appears from the references which I have made that the home with which we are concerned is maintained by the East Sussex County Council for the care and upbringing of one or more of three possible classes of children, which may be briefly defined thus: (1) Children without parents or guardians, or with parents or guardians incapable for any reason of properly looking after them or bringing them up—what were called in the argument "deprived" children: (2) Children whose circumstances and surroundings expose them to moral or physical danger or contamination: and (3) Children who, for whatever reason, are out of control or uncontrollable, or have committed offences of a kind punishable in the case of an adult by imprisonment—what may for convenience be called, in modern terminology, "delinquent" children. For reasons which I have already attempted to state, a gift for the purpose of providing for the care and upbringing, in other words a home for the class of "deprived" children, within the area of the local authority is, in my view, a gift constituted for charitable purposes. In my judgment, a similar gift for the benefit of children of the second class above named within the area, whether alone or in conjunction with "deprived" children, would, for like reasons, also be within the spirit and intendment of the preamble. But what of the third class, the class of delinquents? I agree with Harman J. that a home established for the care of such children cannot properly be described as a "house of correction," as that phrase is used in the statute of Elizabeth I. Nevertheless, if I am right in thinking that the care and protection of children of the first two classes above mentioned is prima facie within the spirit and intendment of the statute, the reference to houses of correction seems to me to support the view that the charitable nature of the purpose of looking after children is not negatived by the circumstance that some (or even all) of the children who require care and protection are children who have fallen into evil associations and evil habits. After all, the notion underlying the relevant provisions of the Acts of 1933 and 1948 is surely that children of the delinquent class have fallen into their bad habits and associations through lack of the care and protection which a home of the kind contemplated by the Acts can provide: and because, in the absence of such care and protection, they, as children, are defenceless against the temptations to which they are exposed. I should add that I do

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not think that the result is affected by the circumstance that the parents or guardians of the children are liable to contribute to their maintenance. There is no evidence before us of the extent to which in practice such contributions are obtained, but in the nature of things, and in the light of the general scope and background of the legislation, it could not, in my view, have been or be contemplated that such contributions would play in truth other than an entirely incidental or ancillary part in the general conduct of the homes.

It was not suggested in argument that because the effect of the disposition of this testator would be in some relief of rates the result was materially affected. It follows, therefore, in my judgment, that if the purpose of the gift in the present case had been expressed to be towards the maintenance and equipment of the Southdown Home in accordance with the obligation of the legislation, it would have qualified as a good charitable gift. But there remains the second question posed above—is the result altered by the use of the words " for the general benefit and " general welfare " of the children in the home? It is upon this form of words, as I believe, that my brethren have particularly relied as being inconsistent with a valid charitable gift. As my brother Romer has put it in his judgment (which I have had the advantage of reading in advance), the effect of the words is to justify the use of the income of the property devised for the provision of mere amenities, such as a television set or a gramophone for children of what I have called the delinquent class.

In my judgment, the question is really one of the construction of the words I have quoted. The testator must, I think, be taken to have known the statutory purpose of Southdown House and the statutory powers and duties in regard to it of the East Sussex County Council. Indeed, he refers in terms to the nature of the work at the home and to his desire that his gift should be taken as a mark of his appreciation of that work. Construed in that context, the words " general benefit and general welfare " ought not, in my judgment, to be treated as meaning anything more than " generally for the benefit and welfare of the children in " accordance with the local authority's obligations under the " statutes." I must not be taken to be saying that the result would be different though the effect were to be to enable the council to apply that gift in acquiring for the children amenities which they might not otherwise be able to enjoy. It has been held (and, in my view, rightly) that a trust for providing amenities in publicly owned hospitals, if otherwise tending to further the purposes of the hospitals or to promote their efficiency, constitutes a good charitable gift (see, for example, *In re White's Will Trusts* [6]); and I see no reason why a parity of reasoning should not be applied to the case of the children in Southdown House. But I have, in my citations from the relevant legislation,

[6] [1951] W.N. 152; [1951] 1 All E.R. 528.

emphasized the use, more than once, of the word "welfare." I refer again to the language of section 12 of the Act of 1948: ". . . so as to further his best interests, and to afford him opportunity for the proper development of his character and abilities." In my judgment, the words used by the testator do no more than briefly express the same thing. Funds provided generally for the care of the sick and maimed are necessarily used for their general welfare and benefit, and intended by their very application to be so used. So here, the purpose of the provision of maintenance and equipment of Southdown House is for the general benefit and general welfare of the resident children. Indeed, the use of the adjective "general" seems to me rather to postulate the application of the gift towards the welfare and benefit of the children taken as a whole, than to contemplate its use for providing for particular children special advantages or means of enjoyment beyond the scope of the general intention of the Act in establishing these homes.

If, therefore, matters rested with me, I would allow the appeal. In the result, it would be necessary to consider the question raised by the cross-appeal, which is of the following nature. At the date of the testator's death the property, the subject of the devise with which I have so far dealt, was, together with another house belonging to the testator and known as Wytham Place, the subject of charges in favour of the testator's bankers, Westminster Bank Ltd. Wytham Place was not the subject of any specific devise contained in the testator's will, and formed accordingly part of the testator's residue given in favour of the first defendant, Mr. Tonge's client. If the specific devise of "St. Anton" and "Kinninghall" can take effect as a good charitable gift, the question then arises whether these properties must bear a due proportion of the amount owing to the Westminster Bank at the testator's death; or whether they are entitled to throw the whole amount of the debt upon Wytham Place (or its proceeds of sale), which was the subject of the testator's residuary disposition. On the view which Harman J. took on the first question, this second matter did not in strictness arise: but as it had been fully argued before him, the judge expressed his opinion against the claim of the residuary legatee. My brethren have, upon the first question, reached the same conclusion as Harman J. and, since the second question does not therefore require a decision from this court, they have preferred to express no view upon it. In the circumstances, I, too, prefer to express no conclusion upon it, but in case this matter should go further, I have thought that I might usefully add some observations, though I do so briefly, upon the point raised by the cross-appeal.

The question depends upon the effect of section 35 of the Administration of Estates Act, 1925, when applied to the facts of the present case. [His Lordship read section 35 (1) so far as relevant to the present case, and continued:] The argument of

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Mr. Buckley was to the effect that since, for the purpose of paying unsecured debts, residuary realty was chargeable in priority to realty specifically devised, and could therefore be sensibly regarded (from the point of view of the liabilities to which the estate was subject) as ranking lower than specifically devised realty, the specific devise of " St. Anton " and " Kinninghall " ought to be regarded as expressing " a contrary or other inten- " tion " within the meaning of section 35 (1) of the Administration of Estates Act, 1925. Harman J. said that this view appealed to him in any case and in the absence of authority: but the judge found support for his view in the decision of Lord Romilly M.R. in *Brownson* v. *Lawrance*,[7] which he (Harman J.) himself had followed in the case of *In re Biss, decd.*[8] *Brownson* v. *Lawrance*[9] was a decision under Locke King's Act, properly called the Real Estate Charges Act, 1854. The Master of the Rolls had based his view on the premise that real estate, the subject of a residuary devise, could not be regarded as specifically devised. It is now conceded (as was pointed out, for instance, by Malins V.-C. in *Gibbins* v. *Eyden*[10]) that the premise was, as the law then stood, not well founded. For this reason it is also conceded that *Brownson* v. *Lawrance*[11] must be regarded as not having been correctly decided. But it was said that since the validity of Lord Romilly M.R.'s premise must, under the Administration of Estates Act, 1925, be now taken as restored, the authority of *Brownson* v. *Lawrance*[11] ought to be regarded as re-established.

This, however, is not the end of the tale of authority. In *Sackville* v. *Smythe*[12] the same point came before Lord Romilly M.R.'s successor, Sir George Jessel M.R. The facts were that a testator devised part of his estate, to which he was entitled subject to a mortgage, for the benefit of his widow for life and the remainder to his residuary devisee. He bequeathed his personal estate subject to debts, and directed that the deficiency should be charged on his residuary real estate. Sir George Jessel's short judgment was as follows[13]: " I can find in this will no contrary " or other intention within the meaning of the exception in Locke " King's Act. It has been enacted that a general direction for " payment of debts out of personal estate shall not be deemed " to exonerate mortgaged properties, and what is there in this " case to take it out of the general rule? If I were to decide " otherwise, I should have to hold that every devise of a life " interest in real estate was an expression of a contrary intention. " It does not appear to me that Locke King's Act was intended " to apply as between specific and residuary devises in the way " it was held to apply in *Brownson* v. *Lawrance*.[14] "

It will be seen that the view of Sir George Jessel M.R. was directly contrary to that of Lord Romilly M.R., apart altogether

[7] (1868) L.R. 6 Eq. 1.
[8] [1956] Ch. 243.
[9] L.R. 6 Eq. 1.
[10] (1869) L.R. 7 Eq. 371.
[11] L.R. 6 Eq. 1.
[12] (1873) L.R. 17 Eq. 153.
[13] Ibid. 155.
[14] L.R. 6 Eq. 1.

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from the premise on which the latter had been based: for in Sir George Jessel M.R.'s view, a specific devise of realty could not of itself amount to an expression of contrary intention within the meaning of Locke King's Act. Thirteen years later these conflicting views were considered by North J. in *In re Smith* [15]; and that judge preferred the view of Sir George Jessel M.R. to that of Lord Romilly M.R. No doubt seems to have been since cast on North J.'s opinion during the 70 years which elapsed before *In re Biss* [16] came before Harman J. It does not appear, however, that the cases of *Sackville* v. *Smythe* [17] and *In re Smith* [18] were cited to Harman J. either in *In re Biss* [19] or in the present case. Had they been so cited, it is possible that Harman J. would have decided the two cases before him otherwise than as he did. As I have earlier said, I prefer in the circumstances—including the circumstance that *In re Biss* [19] has not been the subject of any appeal—to leave the matter open for further consideration (in the light of all the cases to which I have referred), if and when the point again arises.

Appeal dismissed.
No order on cross-appeal.
Declaration as to payment of £2,094 16s. 1d. *struck out of order.*
Leave to appeal to the House of Lords.

Solicitors: *Sharpe, Pritchard & Co. for H. S. Martin, Lewes; Haslewoods for Philcox & Son, Seaford.*

B. A. B.

[15] (1886) 33 Ch.D. 195.
[16] [1956] Ch. 243.
[17] L.R. 17 Eq. 153.
[18] 33 Ch.D. 195.
[19] [1956] Ch. 243.

[QUEEN'S BENCH DIVISION.]

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Lord Goddard C.J.

[1956 H. No. 509.]

Perjured Evidence—Whether a tort—Criminal proceedings—Allegation of perjury in criminal proceedings—Whether action for damages will lie at suit of person alleging damnification by false evidence.

An action for damages will not lie at the suit of a person who alleges that he has been damnified by false evidence given against him in criminal proceedings.

Revis v. *Smith* (1856) 18 C.B. 126 and *Henderson* v. *Broomhead* (1859) 4 Hurls. & Norman 569, and dictum of Lord Halsbury in *Watson* v. *M'Ewan* [1905] A.C. 480, 486 applied.

PRELIMINARY POINT OF LAW.

In March, 1955, the plaintiff was indicted at Gloucester Assizes and (according to para. 22 of his statement of claim) was found

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guilty on sixteen out of seventeen counts under section 12 (1) (*a*) (i) of the Prevention of Fraud (Investments) Act, 1939, and sentenced to eight years' preventive detention on each count to run concurrently, which sentence he was still serving. In February, 1956, he brought an action claiming damages against the defendants jointly and severally in which one of the heads of claim alleged was that the first defendant, called as a witness for the prosecution, gave false evidence at his trial; by paragraph 21 of the statement of claim he alleged that "in the "course of the said trial the first named defendant falsely and "maliciously and without just occasion or excuse committed "perjury in relation to the facts of the case," and after setting out particulars, that "it was a reasonable and probable conse- "quence of the aforesaid perjury that there would be a conflict "of evidence between the plaintiff and the first named defendant "and that in consequence thereof the plaintiff would be "convicted."

By paragraph 16 of the defence the defendants, after denying that the first defendant had committed perjury in the course of the plaintiff's trial, contended that, "assuming the first defendant "committed perjury or spoke falsely, maliciously or without just "occasion or excuse in relation to the facts of the plaintiff's trial "or uttered false statements concerning the plaintiff in the course "of the plaintiff's said trial, then such acts or omissions on the "part of the first defendant do not give to the plaintiff any cause "of action against the defendants, alternatively that perjury "or other false statement made by a witness in the course of "criminal proceedings does not constitute a tort nor any other "wrong giving rise to a civil remedy in damages at the suit of "him who has been convicted or who has suffered damage by or "because of such perjury or false statement."

On June 18, 1958, Master Diamond ordered that the contentions raised by the defendants in paragraph 16 of the defence be argued as preliminary points of law under R.S.C., Ord. 25, r. 2.

Martin Jukes Q.C. and *Roy McAulay* for the defendants.
Ashe Lincoln Q.C. and *L. A. de Pinna* for the plaintiff.

The following cases were cited in argument: *Damport* v. *Simpson* [1]; *Eyres* v. *Sedgewicke* [2]; *Rex* v. *Skinner* [3]; *Revis* v. *Smith* [4]; *Henderson* v. *Broomhead* [5]; *Munster* v. *Lamb* [6]; *Watson* v. *M'Ewan* [7]; *Onslowe's Case* [8]; *Amey* v. *Long* [9]; *Skelhorn* v. *Harrison* [10]; *Smith* v. *Selwyn* [11]; and *Roope* v. *D'Avigdor*.[12]

LORD GODDARD C.J. stated the facts and contentions set out above and continued: The simple point that I have to decide is

[1] (1596) Cro.Eliz. 520.
[2] (1620) Cro.Jac. 601.
[3] (1772) Loffts Reps. 55.
[4] (1856) 18 C.B. 126.
[5] (1859) 4 Hurls. & Norman 569.
[6] (1883) 11 Q.B.D. 588.
[7] [1905] A.C. 480.
[8] 2 Dyer 242b.
[9] (1807) 1 Camp. 14.
[10] (1600) Cro.Eliz. 714.
[11] [1914] 3 K.B. 98.
[12] (1883) 10 Q.B.D. 412.

whether or not an action lies at the suit of the person who says that he has been damnified by false evidence given against him. In my opinion it is perfectly clear and beyond peradventure nowadays that such an action will not lie. The matter has been adumbrated and considered since the thirty-eighth and thirty-ninth year of Queen Elizabeth I. It was raised again in the eighteenth year of the reign of James I. It is true that in Part III, chapter 74, p. 164 of Coke's Institutes, there is a passage by that most learned writer which gives rise to an argument that such an action would lie, but the two cases, *Damport* v. *Simpson* [1] and *Eyres* v. *Sedgewicke*,[2] decided in the reigns of Queen Elizabeth and James I decided that it would not. I do not propose to deal with those cases at any length because there is to be found modern authority to the effect that such an action will not lie, and nobody has been able to point to any case in the whole history of our law in which such an action has been entertained by the courts.

In *Rex* v. *Skinner* [3] an indictment was preferred for scandalous words spoken of a jury by one of His Majesty's justices of the peace, and on a motion to quash the indictment Lord Mansfield said [4]: "I am willing, as neither Serjeant Davy, nor Mr. Buller, "find any precedent in the history of England, for an indictment "of this kind, to give them time till next term to find any. "What Mr. Lucas has said is very just; neither party, witness, "counsel, jury, or judge, can be put to answer, civilly or "criminally, for words spoken in office." That is a perfectly clear statement by one of the greatest common lawyers that ever lived, that for words spoken by a witness "in office," which means, of course, for this purpose in giving evidence, he cannot be put to answer either civilly or criminally.

The matter has been dealt with even more concisely and clearly in a series of cases beginning with *Revis* v. *Smith* [5] in which Jervis C.J., giving the first judgment, said [6]: "I am of "opinion that this action will not lie. Mr. Brown admits that "the proceeding is somewhat novel. It is in truth entirely so, "and, as I think, totally without principle or analogy to sustain "it. So far as appears from the declaration, it is quite consistent "that the defendant believed what he stated to be true; and we "are called upon to punish him in a civil action for a statement "made by him in the course of a judicial proceeding, which state-"ment he believed himself to be justified in making, and had an "interest in making. But, take the converse case"—that is to say, where he did not believe the statement—"Mr. Brown says "that the moment a witness swerves from the truth, an action lies "against him at the suit of the party injured. What would be "the consequence of that? Why, that you would be trying him "for perjury; and, by the testimony of one witness in a civil suit,

[1] (1596) Cro.Eliz. 520.
[2] (1620) Cro.Jac. 601.
[3] (1772) Loffts Reps. 55.
[4] Ibid. 56.
[5] (1856) 18 C.B. 126.
[6] Ibid. 140.

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" you would be convicting a man of a crime of which he could " not be convicted in a court of criminal jurisdiction without the " concurring testimony of two. By the general policy of the law, " a witness is privileged: and I see nothing to take this case out " of the general rule." Cresswell J. said [7]: " I entirely agree with " my Lord. It is enough to say that the world has gone on very " well without such actions as these; and I doubt whether it " would continue to do so if such things were allowed. It would " be highly inconvenient to hold a man liable where he gives " evidence which is relevant to the cause. It is admitted that this " action is without precedent. It certainly is not within any " principle that I am aware of; and I am not disposed to intro- " duce it." Crowder J. gave judgment to the same effect, and so did Willes J. Jervis C.J. there pointed out what occurred to me directly I read this pleading and understood what the point was that I had to try; namely, that it would be most unfortunate if an action for damages for alleged perjury could be brought not only when nobody had been convicted of perjury, but, quite apart from that, merely on the allegations of a person who says that somebody has committed perjury, which led to him being damnified either by being convicted or put on trial. For if such an action could be brought, then, in these days, when the State provides legal aid, half the prisoners in England would try to bring actions and there would be an abundance of these actions in the courts, which would be a most unfortunate result. It has to be remembered that sometimes people are brought to give evidence by subpoena, and that they can be compelled to give evidence. That, of course, does not excuse them for committing perjury, but the penalty for committing perjury is not that they should be asked to pay damages, but that they should be sentenced for the crime which has been committed—and sentenced by a criminal court.

In 1859, in *Henderson* v. *Broomhead* [8] it was sought to bring an action against a person who, in the course of a cause, made an affidavit in support of a summons taken out in the cause which was scandalous, false and malicious, though the person scandalized and who complained was not a party to the cause. It was held that no such action lay, and Erle J. said [9]: " The question " is, whether an action will lie against a party who in the course " of a cause made an affidavit which contained matter scandalous " to the present plaintiff, and which was false and malicious." Then he said [10]: " The question then is, whether, instead of " prosecuting the person who made the affidavit, for perjury, the " party aggrieved has a right to bring a civil action. An action " will not lie for defamatory words spoken in the course of litiga- " tion which are relevant to that litigation. The authorities are " collected in the note to *Lake* v. *King*,[11] and the general rule " is there stated: ' No false or scandalous matter contained in

[7] Ibid. 141.
[8] (1859) 4 Hurls. & Norman 569.
[9] 4 Hurls. & Norman 569, 576.
[10] Ibid. 577.
[11] (1670) 1 Saund. 131b, note 1.

" ' articles of the peace exhibited to justices of the peace, or in " ' any other proceeding in a regular course of justice, will make " ' it libellous.' " Later on in his judgment he said [12]: " The " party may be punished, and the abuse repressed by a prosecu- " tion for perjury, the result of which is to make the defendant " infamous if he is convicted. It is said that the civil remedy " should be allowed for the purpose of indemnifying the party " injured. But the balance of inconvenience is strong against " such an action; witnesses would be subjected to peril. A party " might be allowed, by his own single testimony against the oath " of the witness, to obtain a verdict and get large damages, " whereas the rule of law is that an oath shall never be deemed " false or the witness perjured on the unsupported testimony of a " single witness." Then he said [13]: " The case of *Revis* v. " *Smith* [14] is a very recent authority that though an affidavit made " in a judicial proceeding is false, slanderous and malicious, no " action will lie against the party making it. We have, therefore, " a large collection of cases where from time to time parties have " attempted to get damages in cases like the present, but in no " one instance has the action ever been held to be maintainable. " If for centuries many persons have attempted to get a remedy " for injuries like the present, and there is an entire absence of " authority that such remedy exists, it shows the unanimous " opinion of those who have held the place which we do now, " that such an action is not maintainable." Crompton J.[15] con- cluded his judgment in that case by saying that the effort made in *Revis* v. *Smith* [16] to sustain an action analogous to an action for malicious prosecution seemed to have been made in despair—it was a despairing attempt.

But again, so far as this court is concerned, how can I possibly ignore what Lord Halsbury said in *Watson* v. *M'Ewan* [17]: " The " broad proposition I entertain no doubt about, and it seems to " me to be the only question that properly arises here; as to the " immunity of a witness for evidence given in a court of justice, " it is too late to argue that as if it were doubtful. By complete " authority, including the authority of this House "—and in this I think that he is referring to *Dawkins* v. *Lord Rokeby* [18]—" it " has been decided that the privilege of a witness, the immunity " from responsibility in an action when evidence has been given " by him in a court of justice, is too well established now to be " shaken. Practically I may say that in my view it is absolutely " unarguable—it is settled law and cannot be doubted. The " remedy against a witness who has given evidence which is false " and injurious to another is to indict him for perjury; but for " very obvious reasons, the conduct of legal procedure by courts " of justice, with the necessity of compelling witnesses to attend,

[12] 4 Hurls. & Norman 569, 577.
[13] Ibid. 578.
[14] 18 C.B. 126.
[15] 4 Hurls. & Norman 569, 579.
[16] 18 C.B. 126.
[17] [1905] A.C. 480, 486.
[18] (1875) L.R. 7 H.L. 744.

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" involves as one of the necessities of the administration of justice " the immunity of witnesses from actions being brought against " them in respect of evidence they have given. So far the matter, " I think, is too plain for argument." That decision of the House of Lords in 1905 makes it unnecessary for me to consider at length the judgments in *Munster* v. *Lamb*,[19] and the other authorities cited to me today.

I hope that Mr. Ashe Lincoln will not think that I have been discourteous to him if I say that it seems to me that this is an obvious " try on." Attempts have been made over a period of 200 or 300 years to bring these actions, but they have universally failed. In my opinion, as Lord Halsbury said,[20] it is absolutely unarguable.

I therefore decide that the contention raised by the defendants in paragraph 16 of the defence is correct. It follows that paragraphs 21 and 22 of the statement of claim must be struck out as disclosing no cause of action.

Order accordingly.

Solicitors: *Barlow, Lyde & Gilbert; Basil Greenby & Co.*

J. F. L.

[19] (1883) 11 Q.B.D. 588. [20] [1905] A.C. 480, 486.

[CHANCERY DIVISION.]

1958
July 14.

Danckwerts and Upjohn JJ.

In re COOPER (A BANKRUPT). *Ex parte* THE TRUSTEE *v.* REGISTRAR AND HIGH BAILIFF OF PETERBOROUGH AND HUNTINGDON COUNTY COURTS.

[No. 18 of 1957.]

Bankruptcy — Execution — Costs — Sheriff — Execution on goods after receiving order—Goods returned—Costs of execution—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 26—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 40, 41.

The sheriff's officer on July 4, 1957, attempted to levy execution on two tractors of a debtor pursuant to two warrants of execution issued to judgment creditors. He left forms with an employee of the debtor stating that execution had been levied, and also gave the employee two forms asking the debtor to agree to a " walking " execution."

On July 10, the debtor was adjudicated bankrupt on his own petition and a receiving order was made the same day. On July 11 the sheriff's officer, not having received notice of the bankruptcy, took possession of the tractors, two transporters having been sent for that purpose under arrangements made by the clerk to the county court. On July 12, the official receiver asked for the return of the tractors and they were returned. The costs of the execution,

amounting to some £70, were allowed by the county court judge, who found that the registrar and high bailiff was entitled to the protection of section 41 of the Bankruptcy Act, 1914,[1] in respect of these executions.

On appeal from that order by the bankrupt's trustee in bankruptcy:—

Held, (1) that, assuming that the only taking in execution was on July 11, the provisions of section 41 (1) applied, although the execution took place after the date of the receiving order, and that, accordingly, the costs of the execution were a first charge on the bankrupt's property and the claim for them had been rightly allowed.

(2) *Per* Danckwerts J., that it was a question of fact whether a seizure was an effective execution; in the present case the acts done on July 4 (which was before the adjudication) did amount to an effective execution, and subsequent events entirely negatived any intention to abandon possession.

Lumsden v. *Burnett* [1898] 2 Q.B. 177; 14 T.L.R. 403 applied.

APPEAL from Judge W. Lawson Campbell sitting at Peterborough County Court.

The following statement of facts is taken from the judgment of Danckwerts J.: Two judgment creditors of the debtor obtained warrants of execution on May 15 and June 11, 1957, which were duly delivered to the sheriff for execution. They were in different county courts: one was in Huntingdon County Court and the other was in the Biggleswade County Court.

On July 4, 1957, the sheriff's officer proceeded to effect an execution if he could. He went to the debtor's farm where he had made repeated attempts to find the debtor at home and had

[1] Bankruptcy Act, 1914, s. 40: "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor." S. 41 (1): "Where any goods of a debtor are taken in execution, and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge."

Sale of Goods Act, 1893, s. 26: "A write of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same: Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff."

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been unsuccessful; on this occasion, intending to levy execution on two caterpillar tractors, he handed to an employee of the debtor forms stating that execution had been levied on the two tractors, although the tractors were not removed. He also handed to the same employee two forms inviting the debtor to agree to a walking execution.

On July 10, 1957, the debtor filed his own petition in bankruptcy and a receiving order and order of adjudication were all made the same day. On July 11, the sheriff's officer, in good faith, because no news of this had reached the sheriff, went back to the farm and proceeded to seize the two tractors and have them carried away on two transporters. These transporters arrived under arrangements made by the clerk to the county court on information received from the sheriff's officer on July 4, when the clerk immediately made arrangements with an appropriate firm to remove the tractors and, accordingly, these transporters arrived on July 11 and removed the tractors in question.

On July 12 the official receiver asked for the return of the tractors and they were returned. On August 6, a letter was written asking for payment of the sheriff's costs of the execution which amounted to something over £70, because there had been the expensive arrangements made for removing the tractors.

The question of costs was brought before the county court judge for Peterborough and Huntingdon on March 4, 1958, and on March 10, 1958, there was a hearing in chambers before him. On April 17, 1958, he made an order that the registrar and high bailiff was entitled to the protection afforded by section 41 of the Bankruptcy Act, 1914, relating to the executions, and directed that such costs should be taxed by the registrar of the Cambridge County Court and paid by the trustee of the bankrupt out of the assets of the bankrupt. The trustee appealed from that order.

B. J. M. Clauson for the trustee in bankruptcy.

Denys Buckley for the Registrar and High Bailiff of Peterborough and Huntingdon County Courts.

Cases cited in argument not referred to in the judgment: *Balme* v. *Hutton*[2]; *Ackland* v. *Paynter*[3]; *Bagshawes Ltd.* v. *Deacon*.[4]

DANCKWERTS J. This case raises some interesting points in the law of bankruptcy. It relates to the bankruptcy of a farmer, and the sequence of events appears to be as follows. [His Lordship having stated the facts continued:]

Two questions arise. One is purely a question of fact; the other is a more interesting question of law: Was there an effective seizure in execution on July 4 in the circumstances of this case?

It appears from the cases that it is not necessary that the

[2] (1833) 9 Bing. 47.
[3] (1820) 8 Price 95.
[4] [1898] 2 Q.B. 173.

actual goods be taken into possession by the sheriff's officer. Also it is not necessary that he should retain possession of the goods. What is known as a "walking possession" has become rather more common than it used to be in the old days because of the difficulty of getting appropriate persons to remain in possession of the goods, largely, perhaps, because of the economic situation. There is certainly one authority which shows that very little in the way of actual seizure would be sufficient to satisfy the requirements of delivery in execution. I refer to *Lumsden* v. *Burnett*.[1] That was a case of a distress in respect of income tax where the distress was claimed to have been levied on eight pairs of trousers which were never actually taken into possession by the officer nor did he retain possession of them. He received a document signed by a girl of 13 which was, of course, of no value whatever. But, none the less, it was held that he had effected execution and that the execution had not been abandoned although the most that the officer did was to go and visit the premises occasionally to see whether the goods on the premises had been removed. The point of that case was a different one, of course: Whether in the circumstances the income tax authorities could charge half-a-crown a day on the footing that the bailiff had been in possession, which, of course, in actual fact he had not and, therefore, it was held that they could not recover the half-a-crown a day. But it does indicate the way in which very simple acts would be sufficient to satisfy the requirements of the taking and retaining of possession. But it is, in each case, a question of fact, and the abandonment of possession, if possession had been taken, is also a question of fact. In the present case, in my view, the requirements were sufficiently satisfied by the sheriff's officer coming upon the farm and indicating to an employee of the debtor that he was levying an execution on these two tractors. Subsequently, it seems to me that the events entirely negatived any intention to abandon possession which was originally taken, because everything was consistent with completing the process of execution: the sheriff's officer informing the clerk to the court, the clerk to the court making the arrangements for the taking away of the tractors, and the final removal of the tractors on July 11 in pursuance of those arrangements.

I should be prepared to find, if I had to decide the case on that ground, that there was a taking in execution on July 4, 1957. But there was also the other point which arises on the footing that the only taking in execution was on July 11. That was, of course, after the receiving order and after the adjudication which had been made the preceding day, although no notice of that had reached the sheriff before. It has been argued on behalf of the trustee in bankruptcy that any title by execution in those circumstances cannot prevail over the title of the trustee in bankruptcy in whom the property vested under the provisions of the Bankruptcy Act, 1914, on the adjudication in bankruptcy. The legal

[1] [1898] 2 Q.B. 177; 14 T.L.R. 403.

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position is that the effect of the execution primarily depends on section 26 of the Sale of Goods Act, 1893. [His Lordship read section 26 of the Act of 1893.] The effect of that would seem to be that the title or right given by virtue of the writ remains effective not only against the goods in the hands of the original debtor but also against any transferee other than a purchaser in good faith and for value. Therefore, prima facie, it would have appeared that the writ would be effective against the trustee in bankruptcy who, of course, does not give value but merely claims title by process of law.

Mr. Clauson, on behalf of the trustee, relied on *Ex parte Williams, In re Davies*,[2] which was decided on section 12 of the Bankruptcy Act, 1869, and supports the argument to some extent. That, of course, was on a different section of a different Act and it referred to adjudication and not the making of a receiving order, although the provisions in that section in the Act of 1869 resemble more the provisions in regard to the effect of a receiving order in section 7 of the Bankruptcy Act of 1914. Section 7 of the Bankruptcy Act, 1914, provides by subsection (1): "On the making "of a receiving order an official receiver shall be thereby con- "stituted receiver of the property of the debtor, and thereafter, "except as directed by this Act, no creditor to whom the debtor "is indebted in respect of any debt provable in bankruptcy shall "have any remedy against the property or person of the debtor "in respect of the debt, or shall commence any action or other "legal proceedings, unless with the leave of the court and on such "terms as the court may impose." Then subsection (2) provides for the position of a secured creditor, which is irrelevant for this purpose. That section does not in fact say: "Subject to the "provisions of this Act," but one must obviously infer that because it is all part of the same Act. One turns, therefore, to sections 40 and 41 which are headed: "Effect of bankruptcy on "antecedent and other transactions." Section 40 deals with a completed execution. [His Lordship read section 40 (1).] The result of that is that incompleted executions are ineffective and the property has to be brought into the bankruptcy. But, of course, completed executions, by inference, are protected against the effect of the bankruptcy and the benefit is then retained by the execution creditor.

It seems to me that section 41 is concerned with a different situation and that is where the execution has not been completed. It is, of course, on the second part of that subsection that the respondent in the present case relies. It seems to me that Mr. Buckley is right when he suggests that the provisions of that subsection may well refer to an execution which has been taken, or the taking of goods of a debtor in execution, after the date of the receiving order because it refers to "notice being given of a "receiving order having been made," and, of course, it applies

[2] (1872) L.R. 7 Ch. 314.

equally well to a case where the taking of the goods of a debtor has been before the date of the receiving order but where the execution has not been completed. It refers equally well to both situations and I think that the provision is intended to produce a fair result where in complete ignorance the sheriff or his officer have proceeded in execution not knowing that any receiving order has been made at all, or at any rate, not having received any notice in writing that a receiving order had been made.

Consequently the terms of this section do apply to the present case where the taking in execution was made on July 11, and not before, in complete ignorance of the making of the receiving order and adjudication. The section does, therefore, give the judgment creditor the right to have his costs provided for out of the property of the bankrupt in the circumstances which have arisen. So I think that the appeal must fail on both the grounds which I have mentioned.

UPJOHN J. I agree that this appeal fails.

As Danckwerts J. has said, two points arise. The first is purely a question of fact, that is, whether the sheriff or the bailiff effectively seized the two tractors on July 4 and, secondly, if he did so, whether before the date of adjudication he abandoned possession of those tractors. I think that is a very difficult question of fact and with all respect to the judgment which has just been delivered I must not be taken as assenting to it upon this part of the case. I find it unnecessary in fact to express any conclusion on it because I agree with what Danckwerts J. has said in regard to the second point, that is to say, whether there was an effective seizure under section 41, effective, that is, that the judgment creditor should have a claim under section 41 for the costs of the seizure.

Mr. Clauson invited us to take the view that section 41 had no application because when the seizure was made on June 11 the goods in question were no longer the goods of the debtor; therefore they had vested, he argued, in the official receiver. No doubt they had, but that circumstance, in my view, is irrelevant. As Danckwerts J. has pointed out, the right to seize given by section 26 of the Sale of Goods Act, 1893, remains valid and effective against everyone but a purchaser for value without notice. Therefore the fact that the goods have vested in the official receiver matters not, so far as the vesting provisions are concerned; the bailiff would still have a prior right to seize.

I therefore accept Mr. Buckley's argument that one must look at section 7 and sections 40 and 41 to see how far, if at all, the right to seize is effective. It is quite plain in section 40 that, as the seizure was not completed, the execution was not completed before the date of the receiving order and that it must be treated as for the benefit of the bankruptcy. But in section 41 it is significant that the test changes. Section 40 starts: "Where "a creditor has issued execution." In section 41 there is this:

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Upjohn J.

" Where any goods of a debtor are taken in execution," and " and " before the sale thereof . . . notice is served . . . that a receiving " order has been made." I agree with Danckwerts J. in thinking that the terms of this section are applicable to an execution before or after a receiving order or adjudication. All that is required is that if goods are taken in execution and a notice is served on the sheriff that a receiving order has been made certain results flow. One is that the sheriff must hand over any goods or money. But he has this benefit, that the costs of the execution are to be a first charge on the goods or money so delivered.

I agree therefore that this appeal fails.

Order accordingly.

Solicitors: *Kingsford, Dorman & Co., for Buckle & Co., Peterborough; Treasury Solicitor.*

I. G. R. M.

[COURT OF APPEAL.]

C. A.

1958
July 22, 23.

Jenkins, Parker and Pearce L.JJ.

PAWSON and Others *v.* REVELL.

[Plaint No. N. 3696.]

Mortgage—Leasing, power of—Not excluded by mortgage deed—Grant of parol lease by mortgagors—No provision for re-entry on non-payment of rent—Whether lease effective against mortgagees—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 99, 152.

In 1949 N. and his wife, the owners of a farm, mortgaged it to the plaintiffs. The mortgage contained a clause pursuant to section 99 (13) of the Law of Property Act, 1925,[1] excluding the

[1] Law of Property Act, 1925, s. 99: " (1) A mortgagor of land " while in possession shall, as against " every incumbrancer, have power to " make from time to time any such " lease of the mortgaged land, or any " part thereof, as is by this section " authorised. . . . (7) Every such " lease shall contain a covenant by " the lessee for payment of the rent, " and a condition of re-entry on the " rent not being paid within a time " therein specified not exceeding 30 " days. . . . (13) This section applies " only if and as far as a contrary " intention is not expressed by the " mortgagor and mortgagee in the " mortgage deed, or otherwise in " writing, and has effect subject to " the terms of the mortgage deed or " of any such writing and to the " provisions therein contained. . . . " (17) The provisions of this section " referring to a lease shall be construed to extend and apply, as far " as circumstances admit, to any " letting, and to an agreement, " whether in writing or not, for " leasing or letting."

S. 152: " (1) Where in the intended exercise of any power of " leasing, whether conferred by an " Act of Parliament or any other " instrument, a lease (in this section " referred to as an invalid lease) is " granted which by reason of any " failure to comply with the terms of " the power is invalid, then—(*a*) as " against the person entitled after the " determination of the interest of the " grantor to the reversion; or (*b*) as " against any other person who, " subject to any lease properly " granted under the power, would " have been entitled to the land " comprised in the lease; the lease, " if it was made in good faith, and " the lessee has entered thereunder, " shall take effect in equity as a " contract for the grant, at the

statutory power of leasing, but this clause was ineffective by reason of the provisions of the Agricultural Holdings Act, 1948.

In 1953 the mortgagors orally let the farm to the defendant as tenant from year to year at a rent of £100 payable quarterly, there being no provision for re-entry on non-payment of rent. In proceedings for possession the plaintiffs contended that by reason of the omission of such a condition, which was required by section 99 (7), the lease was not one granted under the statutory power conferred by section 99 (1), and was ineffective as against them as mortgagees. The defendant contended that in so far as the lease was imperfect, it was validated by the provisions of section 152 (1) and (6). The county court judge refused an order for possession. On appeal:—

Held, (1) that by virtue of section 152 (6) there should be imputed to the mortgagors an intention to exercise the statutory power of leasing conferred by section 99 (1);

(2) that there was nothing in the authorities to warrant the view that the variation of an oral tenancy agreement by the insertion of a condition of re-entry as required by section 99 (7) would involve a substantial departure from the terms of the agreement; on the contrary, it was exactly the sort of provision the inclusion of which, when necessary to validate the lease, was contemplated by section 152;

(3) that, whether or not it was necessary in an oral tenancy agreement that there should be a condition of re-entry (a question which was open to doubt), on the assumptions that such a condition was necessary, and that its omission would suffice to prevent the agreement being a valid exercise of the mortgagors' powers, the agreement in question was validated by the provisions of section 152.

Observations on the meaning of the expression "inadvertence" in the preamble to the Leases Act, 1849.

APPEAL from a decision of Judge Harper, sitting at Hull County Court.

On April 11, 1949, one Nicholson and his wife, the owners of a farm, mortgaged the farm to the plaintiffs, who were the trustees of a friendly society, to secure the sum of £5,000. The mortgage contained the usual clause excluding the powers of leasing conferred on mortgagors by section 99 of the Law of Property Act, 1925, but that clause was rendered inoperative by the provisions of paragraph 2 of the Seventh Schedule to the Agricultural Holdings Act, 1948.

Some time in 1953 the Nicholsons parted, and the defendant became Nicholson's housekeeper. On June 23, 1953, the Nicholsons orally let the farm to the defendant as tenant from year to year at a rent of £100 payable quarterly, nothing being said about

"request of the lessee, of a valid lease "under the power, of like effect as "the invalid lease, subject to such "variations as may be necessary in "order to comply with the terms of "the power: . . . (6) Where a valid "power of leasing is vested in or "may be exercised by a person who "grants a lease which, by reason of "the determination of the interest of "the grantor or otherwise, cannot "have effect and continuance accord-"ing to the terms thereof indepen-"dently of the power, the lease shall "for the purposes of this section be "deemed to have been granted in the "intended exercise of the power "although the power is not referred "to in the lease."

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any proviso for re-entry on non-payment of rent. In proceedings taken against the Nicholsons in the Chancery Division an order for possession was made in favour of the plaintiffs on March 2, 1956, which became effective 42 days after the date of service on April 16. The plaintiffs then heard for the first time of the defendant's lease, and instituted in the county court proceedings for possession, which were dismissed. The plaintiffs appealed.

Norman Stogden for the plaintiffs.
Raymond Walton and *J. B. Mortimer* for the defendant.

The following cases which were cited in argument are not referred to in the judgments: *King* v. *Bird* [2]; *Davies* v. *Hall* [3]; *Hawke* v. *Dunn* [4]; *In re Jackson & Co. Ltd.* [5]; *Food Controller* v. *Cork.* [6]

JENKINS L.J. stated the facts, read the relevant provisions of section 99 of the Law of Property Act, 1925, and continued: Mr. Stogden, for the plaintiff mortgagees, submits that when all the circumstances of the case are looked at, it becomes apparent that this was not a letting in exercise of the statutory power at all; it was simply a letting at common law to the defendant, binding the interests of the mortgagors, but ineffective so far as the mortgagees were concerned.

One of the matters which has been debated before us is whether, having regard to the terms of subsection (17), it is indispensably necessary that an oral agreement should include a condition of re-entry as stipulated in subsection (7) or whether that is rendered unnecessary by the words "as far as circum-" stances admit" contained in subsection (17). It is plain that so far, at all events, as a lease in writing is concerned, it must contain the condition stipulated in subsection (7), and there appears to me to be no doubt that the omission from a lease in writing of a condition of re-entry would be a defect sufficient to take the letting in question out of the scope of the power.

The basis of Mr. Stogden's submission is that, notwithstanding that this was an oral tenancy and as such clearly exempted by subsection (17) from requirements such as those contained in subsections (8) and (11), it ought to have included the condition for re-entry prescribed by subsection (7). On the other side it is said that may or may not be so, but if it is so, then any consequent invalidity of the tenancy agreement is cured by the provisions of section 152 of the Law of Property Act, 1925.

That section is the successor of the Leases Acts of 1849 and 1850, and I should next read some parts of it. [His Lordship read subsections (1) and (6) and continued:]

A first reading of the provisions of sections 99 and 152, to which I have referred, without regard to any authority but simply

[2] [1909] 1 K.B. 837.
[3] [1954] 1 W.L.R. 855; [1954] 2 All E.R. 330.
[4] [1897] 1 Q.B. 579; 13 T.L.R. 281.
[5] [1899] 1 Ch. 348.
[6] [1923] A.C. 647; 39 T.L.R. 647.

reading the language of the two sections as they stand, would seem to indicate that if the oral tenancy agreement in this case was invalid as a lease granted in exercise of the mortgagors' power of leasing, it was validated by the provisions of section 152 (1) and (6), and the effect of subsection (1) of that section would be to make the oral tenancy agreement "take effect in equity "as a contract for the grant, at the request of the lessee, of a "valid lease under the power, of like effect as the invalid lease, "subject to such variations as may be necessary in order to "comply with the terms of the power," the one and only variation necessary for that purpose, as I understand the position, being the inclusion of a condition of re-entry on non-payment of rent as required by subsection (7) of section 99.

I have said enough to show that to my mind the obstacles confronting Mr. Stogden in seeking to make good his contention are formidable indeed, but he has nevertheless presented his case in a very clear and forceful manner, and we are indebted to him for his assistance. He starts by saying in all the circumstances of this case no intention to exercise the statutory power can properly be inferred. He says this was an informal, and he might have said, I think, a "hole and corner," arrangement between Nicholson and his housekeeper. Its very informality and the fact that it was not made known to the mortgagees until this present action was actually in progress are, says Mr. Stogden, indications that this was a mere informal arrangement made without regard to the statutory provisions to which a lease granted by the mortgagors must conform in order to make it binding on the mortgagees. He says, therefore, that this must be regarded simply as a letting at common law.

Then as to the validating provisions of section 152, Mr. Stogden referred us to the preamble in the Leases Act of 1849. That preamble is in these terms—I need not read the whole of it. It begins: "Whereas, through mistake or inadvertence on the "part of persons granting leases, and through ignorance on the "part of lessees of the titles of persons from whom leases are "accepted, leases granted by persons having valid powers of "leasing are frequently invalid as against the successors in estate "of such persons by reason of the non-observance or omission "of some condition or restriction, or by reason of some other "deviation from the terms of such powers . . ." I think it is unnecessary for me to read further.

Mr. Stogden fastened upon the words "mistake or inadver-"tence" and said there was nothing amounting in this case to inadvertence or mistake. Here the parties intended simply that the defendant should have an informal oral tenancy. They were ignorant of, and there was no intention to exercise, the mortgagors' leasing power. In my view that submission is really demolished by the plain terms of section 152 (6), the effect of which is that where a person grants a lease which he can only grant as a valid lease in exercise of the power, he is to be deemed

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to have granted it in intended exercise of the power. The clear words of that subsection, as I think, require us to impute, for the purposes of validation, an intention on the part of the mortgagors in this case to exercise the power. As to the use of the phrase "mistake or inadvertence" in the preamble to the Act of 1849, Mr. Walton said that the point sought to be made of these words by Mr. Stogden was more than offset by the reference to ignorance on the part of lessees of the title of persons from whom leases are accepted, and I should also note that with respect to the types of error which might give rise to a case for validation, Mr. Walton called attention to the words "by reason of the non-observance or omission of some condition or restriction."

Then Mr. Stogden said in effect that where a lease was made in terms exceeding the statutory power it ought, prima facie at all events, to be regarded as a mere grant of a tenancy at common law, and in support of that submission he referred us to *Iron Trades Employers Insurance Association Ltd.* v. *Union Land and House Investors Ltd.*,[1] in which the leasing powers of mortgagors were discussed at some length by Farwell J. Mr. Stogden's proposition on this part of the argument was in effect this, that so soon as it is found there is any omission from a lease by a mortgagor of anything required to be included by section 99 of the Act of 1925, or that the mortgagor has failed to do something required to be done under that section, then the lease should not be regarded as made in purported exercise of the power for the purpose of validation under section 152. It seems to me that if one accepted that proposition, at all events in the broad form in which it was put by Mr. Stogden, section 152 would be deprived of practically the whole of its effect. In my view nothing said by Farwell J. in the *Iron Trades* case[2] bears out that broad proposition.

In that case the facts stated in the headnote are these: "By a legal charge dated October 1, 1935, the defendants charged "by way of legal mortgage certain freehold properties to the "plaintiffs, and they covenanted with the plaintiffs that they "would not, except with the previous written consent of the "plaintiffs, exercise the power of leasing or agreeing to lease or "of accepting surrenders of leases conferred by the Law of "Property Act, 1925, on a mortgagor while in possession." Then there was a letting in connexion with which the plaintiffs were not asked for and did not give their consent, and the decision was "that the defendants, in granting the lease of "October 8, were not exercising their statutory power, and that "consequently they did not commit any breach of the covenant "contained in the legal charge of October 1."

Mr. Stogden said that the effect of that case is that the mortgagors, having failed to comply with the terms of their power, were treated accordingly as exercising merely their

[1] [1937] 1 Ch. 313; 53 T.L.R. 34; [1937] 1 All E.R. 481.

[2] Ibid.

common law power of letting which would not bind the mortgagee. But I think the true effect of the judgment in that case was as stated by Mr. Walton in the course of his argument. He said there were two points in the judgment: the first was that the mortgagors had no power at all to lease without the consent of the mortgagees, and the second was that having no such power they could not, by recourse to section 152, create a power which did not exist. There being no power to lease without consent, and that non-existent power being the power they purported to exercise, it is plain that the case was not one to which section 152 could apply. Accordingly, in my view, that case does not advance Mr. Stogden's argument.

Then Mr. Stogden referred us to a number of authorities showing that section 152 and its statutory precursors did not go the length of creating a substantially different lease from the lease purported to have been granted in exercise of the power. I do not propose to refer to these cases at any length. I might mention first the case of *Hallett* v. *Martin*,[3] and that was cited for this statement by Kay J.: "I must say I think this "lease, in any view of the case, is bad and invalid, as departing, "not in a mere formal manner, from the terms of the power but "departing from them in essential respects."

Then in the case of *Gas Light and Coke Co.* v. *Towse*,[4] which was another decision of Kay J., who in the material passage referred to the preamble to the Leases Act of 1849, and continued: "Now, has there been here any 'mistake' or "'inadvertence' or 'ignorance on the part of the lessees' of the "title? Nothing of the kind." Then further on he said[5]: "There is no 'mistake,' no 'inadvertence,' no 'ignorance of "'title,' nothing whatever which would enable me to apply the "terms of that Act to this lease. I cannot find any defect; I find "that the parties deliberately, voluntarily, knowing exactly what "the powers were, chose to take their lease in this form. I am "quite unable to see any defect, any mistake, any inadvertence, "or anything whatever to induce me to alter the form of the "lease in any respect. So much for that objection."

As to the other cases cited by Mr. Stogden, I may confine myself, I think, to making brief references to the following. *In re Newell and Nevill's Contract*[6] concerned a lease granted by a tenant for life of the surface, reserving the minerals, where there was no power for him to grant such a lease. It is obvious the difference there between the lease purported to have been granted and the lease which the tenant for life had power to grant was clearly a most substantial matter.

Then there was *Brown* v. *Peto*,[7] where a lease included furniture and sporting rights as well as land, and the whole was let at

[3] (1883) 24 Ch.D. 624, 632.
[4] (1887) 35 Ch.D. 519, 539; 3 T.L.R. 483.
[5] 35 Ch.D. 519, 540.
[6] [1900] 1 Ch. 90.
[7] [1900] 1 Q.B. 346; 16 T.L.R. 561.

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one rent without distinguishing what portion of it was attributable to such things as the furniture. That again was obviously a very different case from the present, because the lease when validated would be substantially different from the lease purported to have been granted. I find nothing in those authorities, or any other authority cited to us, to warrant the view that the variation of the oral tenancy agreement which is here in contemplation, namely, the insertion of the condition of re-entry required by section 99 (7) of the Act of 1925, involved a substantial departure from the terms of the agreement. It is wholly different to cases such as those concerning the omission of covenants to erect buildings or some matter of that sort. The condition here in question may be described as a common form condition which is ancillary to the other provisions of the lease, and is commonly regarded as necessary to make a lease of given property a proper lease of that property. There is no doubt that section 152 contemplates the variation of the provisions of a lease where that is necessary in order to bring it within the terms of the section, and it appears to me that a provision such as this condition of re-entry is exactly the sort of provision the inclusion of which, when necessary in order to validate the lease, was contemplated by section 152.

I now return to what are really the two points in the case: First, where there is an oral tenancy agreement by a mortgagor, is it necessary for its validity under section 99 (17) that it should include the condition of re-entry stipulated in section 99 (7)? This is a short but, to my mind, not an easy point. In Wolstenholme and Cherry, 12th ed., Vol. 1, p. 400, there is this note to subsection (17): "Parol agreement. The effect of the "words 'as far as circumstances admit' is that subsections (7) "and (8) as to covenants, conditions of re-entry and counter- "parts do not apply to a parol agreement, and subsection (7) as "to covenants does not apply to an agreement in writing, except "that there ought to be the nearest approach to a covenant, "namely, an agreement to pay rent." Thus the learned authors of this particular textbook state categorically the view that a condition of re-entry is not required in such a case. But I am not wholly satisfied of that. The only condition of re-entry required is a condition of re-entry on the rent not being paid within a time therein specified not exceeding 30 days. I suppose section 99 (7) could be satisfied by a short condition simply in the terms there laid down. A simple provision of that sort would be as easy to include in an oral tenancy agreement as a provision for the payment of rent on the four usual quarter days. The matter seems to me to be open to doubt, and I prefer to express no opinion upon it. Assuming, without deciding, that a condition of re-entry is required in the case of an oral agreement notwithstanding subsection (17), and assuming further, as I think is right, that that omission, if the condition was necessary to be included, would suffice to prevent the agreement being a valid

exercise of the mortgagors' power, nevertheless it appears to me that a clear case is here made out for validation of the agreement by recourse to section 152.

I should perhaps add one word about "inadvertence." It appears to me that the proper inference from the facts is that the mortgagors intended to give the defendant a tenancy which would be valid as against all the world so far as they were able to do that. They may well have been unaware of the existence of any special power of leasing. They may have simply assumed that any mortgagor could grant a tenancy. I think their ignorance of their true rights in the matter and their consequent failure to include the condition of re-entry, which I am assuming but not deciding should have been included in the oral agreement, amounted to inadvertence within the meaning of the preamble to the Act of 1849, so that so far as it is legitimate to look at the preamble to the Act of 1849 for the purpose of construing section 152, I do not think there is anything in that expression to prevent the application of section 152. If the facts of this case did not amount to inadvertence, I find it very difficult to see how a case of inadvertence could ever be made out. A man granting an interest in land and failing to grant the interest he intended to grant through non-compliance with a power, the existence of which he may have been ignorant of or may have forgotten or overlooked, is acting I think through inadvertence in any ordinary meaning of that expression.

I hope I have now covered all the essential points in this somewhat unusual case, and for the reasons I have endeavoured to state, I think this appeal fails and should be dismissed.

PARKER L.J. I agree that this appeal fails and for the reasons given by my Lord. I would only add this, that in my view the real clue to the decision in this case is to be found in subsection (6) of section 152. Once the conditions set out in that subsection are found to exist, and they clearly do exist in the present case, then the lease shall for the purposes of that section be deemed to have been granted in the intended exercise of the power. Accordingly, once that stage is reached, the power to vary the invalid lease by curing defects in it arises under subsection (1) of section 152. For the reasons given by my Lord, once that stage is reached, I think that whether one looks at the preamble to the Leases Act of 1849 or not, it is plain that there is power under section 152 to vary the lease by supplying a condition for re-entry as required by section 99.

PEARCE L.J. I agree.

Appeal dismissed.

Solicitors: *F. Wilberforce Bridge for Richard Witty & Co., Hull; Smith & Hudson for Payne & Payne, Hull.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

1958
July 15, 16, 17, 18, 21, 22, 23, 24, 31.

McNair J.

RIVERSTONE MEAT CO. PTY. LTD. *v.* LANCASHIRE SHIPPING CO. LTD.

[1955 R. 2318.]

Shipping—Bill of lading—Seaworthiness—Hague Rules—Damage to cargo due to defective storm valves—Negligence of workman of independent contractor—Whether shipowner liable for lack of due diligence—Whether liable for failure to take regular soundings—(Australian) Sea-Carriage of Goods Act, 1924 (*No.* 22 *of* 1924)*—Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., art. III, r.* 1, *art. IV, r.* 2 (*a*).

Ships' Names—Muncaster Castle.

Negligence—Safe system of work—Plant and equipment—Latent defect—Principle governing employer's liability.

On May 7, 1953, 150 cases of tinned ox tongues were shipped on board the defendants' vessel at Sydney for carriage to London under bills of lading to which the plaintiffs were parties. The bills were made subject to the Australian Sea Carriage of Goods Act, 1924.[1] When the goods were discharged at London 113 cases were found to be damaged by sea water which had entered the hold by way of defective storm valves on the port and starboard side of the hold. Immediately before her outward voyage to Australia, the vessel was passed through her No. 2 special survey and her annual load line survey. For this purpose the marine superintendent employed by the defendants' agents instructed a reputable firm of ship repairers to open up all the storm valves and inspection covers. After the inspection by the Lloyd's surveyor, a fitter employed by the firm closed each inspection cover and secured it with nuts. Once the nuts had been hardened up no visual inspection would detect any unevenness in the position of the cover. No sea water entered the hold during the outward voyage and water was not discovered until the cargo was being unloaded in London. Regular soundings were taken in the hold throughout the voyage. The presence of the water in the hold was due to the negligence of the fitter, who failed sufficiently to secure the nuts on the inspection cover, with the result that the working of the ship loosened the nuts. The vessel with the hold in its present condition had remained classified by the classification society since she became a cargo vessel on conversion in 1948. There was no previous record of cargo damage in the hold. On a claim by the plaintiffs for damages for breach of contract:—

Held, (1) that a carrier cannot be held liable for want of due diligence to make a ship seaworthy within article III, rule 1 (*a*) of the Hague Rules, where the unseaworthiness has resulted from the negligence of a workman employed by a competent ship repairer engaged by the carrier, the result of whose negligence would not be discoverable by appropriate surveys and inspections carried out in

[1] Australian Sea Carriage of Goods Act, 1924, Sch., art. III, r. 1: "The "carrier shall be bound, before and "at the beginning of the voyage, to "exercise due diligence to—(*a*) make "the ship seaworthy."

Art. IV, r. 2: "Neither the "carrier nor the ship shall be respon- "sible for loss or damage arising or "resulting from—(*a*) act, neglect or "default of the master, mariner, "pilot, or the servants of the carrier "in the navigation or management "of the ship."

accordance with ordinary prudent practice; in the present case the defendants had discharged the burden of proving that they had exercised due diligence and, therefore, were not liable under article III, rule 1 (*a*) of the Act of 1924.

W. Angliss & Co. (Australia) Pty. v. *P. & O. Steam Navigation Co.* [1927] 2 K.B. 456; 43 T.L.R. 675 applied.

Dictum of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English* [1938] A.C. 57, 80; 53 T.L.R. 944; [1937] 3 All E.R. 628, and *Davie* v. *New Merton Board Mills Ltd.* [1958] 1 Q.B. 210; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67 considered.

(2) That the ship was not unseaworthy in design, but even if she was, this was not due to any want of due diligence on the part of the defendants.

Dictum of Devlin J. in *Waddle* v. *Wallsend Shipping Co. Ltd.* [1952] 2 Lloyd's Rep. 105, 130 applied.

Per curiam: Even if soundings had not been regularly taken such failure was something for which the defendants would not be liable by virtue of the exception in article IV, rule 2 (*a*).

ACTION.

By a bill of lading signed at Sydney on May 7, 1953, by the agent of the defendants, Lancashire Shipping Co. Ltd., and incorporating the provisions of the rules in the Australian Sea Carriage of Goods Act, 1924, 150 cases of ox tongues were shipped on board the defendants' vessel, *Muncaster Castle*, for carriage to London. The plaintiffs, Riverstone Meat Co. Pty. Ltd., were indorsees of the bill of lading. On arrival at London 113 cases were found to be damaged by sea water.

In an action by the plaintiffs for damages, it was claimed that the damage was caused by the unseaworthiness of the vessel, it being alleged, inter alia, that the inspection covers over the storm valves in the scupper pipes were defective, whereby sea water leaked into the hold and damaged the goods; alternatively, that the damage was caused by the negligence of the defendants in failing to discover by proper soundings the presence of water in the hold.

By their defence the defendants contended that they exercised due diligence to make the ship seaworthy and therefore were not in breach of article III, rule 1 of the Act of 1924, and if, contrary to their contention, no proper soundings were taken they were protected by the exception in article IV, rule 2 (*a*).

The facts are fully stated in the judgment.

Ashton Roskill Q.C. and *J. Franklin Willmer* for the plaintiffs.

Michael Kerr for the defendants.

The following cases, not referred to in the judgment, were cited in argument: *Paterson* v. *Robin Hood Mills Ltd.*[2]; *Minister of Materials* v. *Wold S.S. Co. Ltd.*[3]; *The Assunzione*[4];

[2] (1937) 58 Ll.L.R. 33; [1937] W.N. 189.

[3] [1952] 1 Lloyd's Rep. 485.

[4] [1956] 2 Lloyd's Rep. 468.

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RIVERSTONE MEAT CO. PTY. LTD. v. LANCASHIRE SHIPPING CO. LTD.

Bradley & Sons Ltd. v. *Federal S.N. Co.*[5]; *Mersey Docks and Harbour Board* v. *Gibbs*[6]; *The Ferro.*[7]

Cur. adv. vult.

July 31. McNAIR J. read the following judgment: This case raises interesting questions as to the proper construction and effect of article III, rule 1, and article IV, rule 2 (*a*) of the rules scheduled to the Australian Sea Carriage of Goods Act, 1924, which are in identical terms with the corresponding provisions in the British Carriage of Goods by Sea Act, 1924.

On May 7, 1953, there were shipped on board the defendants' vessel, the *Muncaster Castle*, at Sydney under bill of lading of that date 150 cases of tinned ox tongues for carriage to London. The plaintiffs were parties to that bill of lading either as original shippers or as indorsees. The goods in question were stowed in the after half of No. 5 lower hold. When these goods were discharged at the Royal Albert Docks, London, towards the end of July, 1953, the contents of 113 cases out of 150 were found to be damaged by sea water which had entered No. 5 hold by way of defective storm valves on port and starboard sides of that hold, no water having been detected in that hold until the evening of July 16, four days after the vessel arrived in London.

In these circumstances the plaintiffs alleged (1) that the damage was caused by the unseaworthiness of the vessel as particularized finally as follows: "(a) The inspection covers over "the storm valves in the port and starboard scupper pipes "situated in the forward frame space of No. 5 hold were defective "whereby sea water leaked into No. 5 lower hold and damaged the "said goods. (b) No. 5 hold was so constructed that any water "entering the said hold collected forward unless the ship was "trimmed well by the stern. There was no drain-well in the "forward part of the said hold and consequently, with the ship "trimmed as she was at all material times until after commence-"ment of discharge in London, the water which had leaked into "the said hold through the said inspection covers could not drain "away. Nor was there any means of finding out whether there "was water present in the forward part of the said hold, or, if so, "what the depth was. (c) The cargo in No. 5 hold was so "closely stowed that even when the ship was trimmed by the "stern sufficiently to overcome the incline of the ceiling the water "which had leaked into the said hold through the said inspection "covers could not drain, or could not drain sufficiently easily "and quickly, into the drain-well at the after end of the said "hold." The plaintiffs allege (2), alternatively, that the damage was caused by the negligence of the defendants, their servants or agents in failing to discover by proper soundings the presence of water in No. 5 lower hold. I have omitted certain other

[5] (1927) 24 L.L.R. 446.
[6] (1867) 1 E. & I. 93.
[7] [1893] P. 38.

particulars of negligence which were abandoned during the hearing before me.

The defendants' defence may be summarized as follows: (1) that as carriers they exercised due diligence to make the ship seaworthy and, accordingly, are not in breach of their obligation under article III, rule 1, and (2) that if, contrary to their contention, no proper soundings were taken, they are protected in respect of such failure by the exception contained in article IV, rule 2 (*a*) of " act, neglect or default . . . in the navigation or in " the management of the ship."

It will be convenient at this stage to emphasize that the allegations of unseaworthiness as developed at the hearing before me are of three different types: (1) unseaworthiness resulting from the defective condition of the inspection covers over the storm valves, the defect alleged being either (a) that the nuts securing the inspection valves were insufficiently or improperly hardened up, or (b) that the rubber jointings of the inspection covers were perished; (2) unseaworthiness resulting from the design of the sounding or draining arrangements in No. 5 lower hold in that there was no drainage or sounding arrangement in the forward part of that hold, and (3) unseaworthiness by reason of the close stowage of the cargo in No. 5 lower hold preventing the water from draining into the drainage well aft.

The *Muncaster Castle* (8,000 tons gross, 4,800 tons net) is a standard C.3 type vessel, of which many were built in the United States of America during the last war. Though conforming in general hull form and structure to that type, she was originally completed as an aircraft carrier and converted into a cargo carrier in 1948. So converted she conformed in all material respects to a C.3 type cargo vessle. On conversion she was classified with the British Corporation (which was united with Lloyd's Register in 1949) and remained so classified at all material times. In 1949 she was acquired by the defendants, together with another sister ship, the *Greystoke Castle*, and remained in their service, I think, until 1955. Throughout her service with the defendants she was well maintained and no criticism was directed against her maintenance.

No. 5 hold is the aftermost of the five cargo holds. As appears from the plans put in before me, this hold is 82 ft. long, narrowing from 52 ft. at her forward end to 8 ft. at the after end owing to the fining of the vessel's lines aft. The hold ceiling is level and bare throughout its length except that below the square of the hatch there is a permanent wooden tank top ceiling 6 ins. above the hold ceiling.

At the base of the web frames and main frames on either side and behind the vertical spar ceilings there are small drainage holes designed to permit water, which might enter forward and find its way into the wings, to drain aft. At the starboard side at the after end there is a sounding pipe leading to the bare hold ceiling divided from the drain-well or hat box, also aft,

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by a solid longitudinal bulkhead 3 ft. 6 ins. long and extending upwards to deck level. The drain-well can be drained into the tunnel shaft immediately below by a drainage cock. Apart from this, there are no means for clearing water from the hold.

In the foremost frames on both port and starboard sides there lead down from the weather deck two scupper pipes by which water from the scuppers on the weather deck can find its way by means of a clack type storm valve through the shell plating out into the sea. For the purpose of this judgment it is sufficient to say that the open outlet to the sea leads from an inspection chamber which is closed at the top by the inspection cover lying in the horizontal plane. This is bolted to the top of the inspection chamber by four nuts affixed to corresponding studs in the top of the inspection chamber itself. Between the inspection cover and the top of the inspection chamber is a rubber jointing or gasket. Suspended from the inspection cover and inside the inspection chamber is a hinged clack or clapper which, when in the closed position, closes the outlet from the scupper pipe into the inspection chamber. When water comes down the scupper pipe, the clack or clapper opens and allows the water to run out-board. Per contra, when water comes in from the sea, as it may when the vessel rolls or is struck by a wave, the force of water impinging on the clack closes the valve and the force of the water is expended against the inspection cover if properly secured. If the inspection cover is not properly secured or the jointing is defective, this water may find its way into the hold, as in fact happened on the occasion in question.

When the vessel is fully loaded down to her marks on an even keel, the outlet to the sea would, according to the figures given by Mr. Roskill in opening, though different figures were given in evidence, be about 2 ft. above the water line: as loaded on this voyage when on an even keel the outlet would be about 2 ft. 9 ins. above water level, but as for most of the voyage she was trimmed by the stern, the outlet would for a substantial part of the voyage be at or near the water line.

In February, 1953, immediately before her outward voyage to Australia, the vessel was passed through her No. 2 special survey by Lloyd's Register surveyors and reported to be "so far "as seen in good condition and eligible to remain as at present "classed in the register book," this being the highest class for vessels not actually built under the supervision of the society. On the same occasion she was passed through her annual load line survey. Under the Load Line Rules, 1941, made under section 42 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, provision is made for the examination at the annual survey of the discharges leading through the ship's side from spaces below the freeboard deck. In practice, the surveyors are content if only 25 per cent. of the sea outlets are opened up for inspection on the annual survey, but the

defendants insist on all being opened up. Accordingly, for the purpose of this survey, Atkinson, the experienced and competent marine superintendent of Moller Line U.K. Ltd., the managers of the ship, who was attending to the ship on this survey on behalf of the owners, gave instructions to Messrs. Alex Stephens, who are admittedly a ship repairing firm of the highest repute, to open up the storm valves, including the two in question, for inspection. This necessarily involved opening up the inspection covers. Thirty-one storm valves, including the two in question, were opened up for inspection by surveyors of Lloyd's Register, acting as assigning authority on behalf of the Minister of Transport, and the load line certificate was duly renewed.

After the inspection by Lloyd's surveyor, it would be the duty of a fitter employed by Alex Stephens to close each inspection cover by placing a new rubber jointing or gasket between the inspection cover and the top of the inspection chamber, placing the inspection cover over the studs in the top of the inspection chamber and tightening up the nuts. The process, as explained to me, was similar to the more familiar process of refitting the cylinder head to a motor-car engine after decarbonizing. The proper method of tightening up the nuts is not dissimilar to the proper method of fitting a spare wheel and tyre. The nuts are first placed in position and lightly secured. Then the nuts are tightened at opposite angles so as to secure that the pressure all round is even. If the nuts are tightened up in the wrong order, i.e., all the nuts on one side before the nuts on the other side, the pressure will be uneven and it will be impossible to make a secure joint even though all the nuts are hardened up so as to ring true when tapped with the spanner. I am satisfied that, according to ordinary and prudent practice, this work of tightening up, which is a task well within the competence of a skilled fitter, is left to the fitter, and is not in fact supervised by Lloyd's surveyors or the owners' superintendent. Furthermore, once the nuts have been hardened up, no visual inspection would detect any unevenness in the positioning of the cover or any insufficiency in hardening up.

After the valves had been so closed up, the scupper pipes were submitted by the chief officer to the usual hose test, i.e., a hose was inserted at weather deck level. Such a test, however, would not disclose a leaky inspection cover, but only whether the pipe or valve was blocked.

On March 15, 1953, the vessel sailed from Glasgow with general cargo for Australian ports. None of the cargo carried on the outward voyage in No. 5 hold was damaged by sea water. At Sydney the outward cargo stowed in the after half of No. 5 hold was discharged. The hold was then inspected by the chief officer. This inspection revealed no sign of leakage of sea water into the hold on the outward voyage. The plaintiffs' cargo was then loaded in the after half part of No. 5 lower hold. It was probably

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stowed at the bottom of this hold, though the exact position and extent of the stow was not established. On May 7 the vessel sailed for Brisbane, where the remainder of the outward cargo in No. 5 hold, namely, that stowed forward, was discharged. This involved that the places where the storm valves were situated were visible. The hold was again examined by the chief officer; no sign of sea water staining or of rust was found. I am satisfied that in fact these examinations were properly carried out and that, in fact, no sea water did enter through the storm valves or at all into No. 5 hold on the outward voyage.

On the homeward voyage there was some heavy weather on May 31, June 5, 6, 7, 13 and 16, sufficient to make the vessel roll and pitch, and on one occasion sufficient to justify a reduction of speed, but the weather was in no way abnormal for such a voyage. Nevertheless, it was sufficiently severe finally to loosen the nuts of the inspection cover if these were initially improperly hardened up and had become loosened in the working of the ship on the outward voyage.

After discharging cargo at Hull the vessel docked at the Royal Albert Dock on July 13. Discharge from No. 5 hold started on July 14 and continued throughout July 15 and 16 without, so far as the records show, any water being found. However, when the p.m. soundings were taken by the carpenter on July 16 by means of the sounding pipe at the after end of No. 5 hold, 1 ft. 3 ins. of water was found. This was the first indication received by the chief officer or the master that there was in fact water in that hold. At that time there was still cargo covering the whole of the hold ceiling. The chief officer, clambering over the cargo and looking through the vertical spar ceiling, could see water below, but could not then discover the source of entry. The next day, when more cargo had been removed, he observed a rust streak on the starboard side and another less pronounced on the port side leading from the storm valves. Subsequent examination showed that the water had come in from interstices which had developed between the inspection cover and the top of the inspection chamber on both sides. The chief officer formed the impression at the time that the pressure on the jointing was uneven, the rubber jointing itself appearing to be intact and in position.

Without reviewing the evidence further, it is sufficient for me to say that the most probable cause of the admission of sea water on the homeward voyage is that the fitter at Glasgow negligently failed to secure the nuts on the inspection cover evenly or sufficiently, with the result that the working of the ship on the outward voyage was sufficient to produce the condition, by the time the plaintiffs' cargo was loaded at Sydney, that the nuts had been loosened to such an extent that with the vessel rolling and waves striking the sides of the ship seawater was forced through the interstices below the inspection covers, and I so find. I am not satisfied that either of the rubber jointings themselves

was defective. So far as there was direct evidence on this point from Captain Robson, the cargo superintendent, and the chief officer, it was to the effect that the jointing appeared to be in sound condition.

This finding is sufficient to support the plaintiffs' first allegation of unseaworthiness; but I am also satisfied that unless the defendants are in law responsible for the negligence of the fitter, as I have found it, they have discharged the onus of proving the exercise of due diligence so far as concerns the inspection covers.

Before considering the legal issues involved, it is convenient that I should first deal with the question whether, as the plaintiffs allege, it is established that no soundings were in fact taken of No. 5 hold until the p.m. soundings on July 16. The taking of soundings was the duty of the ship's carpenter under the general supervision of the chief officer. The ship's carpenter was not called before me, the explanation being that he had left the ship some years ago and could not be traced. This explanation I accept. His soundings book for the outward and homeward voyage has, however, been produced, and under the heading of No. 5 hold shows day by day merely a dash or no entry at all, whereas in the case of all the other holds a figure or the cypher "0" appears for both morning and evening soundings. In the soundings book for the previous 12 months the position is the same, except that invariably a dash appears for No. 5 hold sounding. In this book the earlier entries were made by the chief officer himself before the carpenter in question joined the ship. The chief officer, who spoke of the carpenter as a reliable man, was quite confident in his evidence that in fact soundings were taken regularly of No. 5 hold. The chief officer gave me the impression that he was a witness of truth and careful in his evidence. For instance, when asked in cross-examination if he had any recollection of himself having seen the carpenter taking soundings in No. 5 hold, he said: "It would be fairer to say that if I had seen him stop at "No. 4 hold I would have taken him up."

I confess that I found some difficulty in understanding why the form of the negative findings for No. 5 hold should differ from the form of the negative findings entered for the other holds; but I think the master was probably correct in the suggestion that the difference was accounted for by the fact that No. 5 hold was the only compartment in which the sounding was made on to the bare tank top or hold ceiling, the other soundings being taken in sounding wells.

Furthermore, if it be the fact, as I find it to be, that the presence of water in No. 5 hold was first ascertained on the evening of July 16 by the carpenter taking the p.m. soundings, the inference is almost inescapable that this sounding was a routine sounding taken in the normal carrying out of the carpenter's duty, and was not an exceptional sounding first taken on that

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day. As against this, it is, of course, difficult to understand why, if regular soundings were taken, the water was not discovered earlier, especially since it is a reasonable inference from the description of the damage found as given by Messrs. Perfect Lambert, the cargo-owners' surveyors, that the damage to part at least of the cases must have occurred a considerable time before the discharge. In this connexion it is relevant to refer to an incident spoken to by the chief officer. It appears that in 1950, after carrying a coal cargo from the United States to Japan, attempts were made to clean No. 5 hold by means of a hose. The vessel was 8 ft. by the stern and, I think, listing. It was found that the water from the hose was trapped forward owing partly to the list and partly to the blocking of the drainage holes in the web frame and main frames and had to be baled out. Thereafter, this hold was never hosed down for cleaning, and thenceforth it was, I think, appreciated that in certain conditions the hold soundings of No. 5 hold would not be entirely reliable. Capt. Robson also speaks to finding water trapped forward after completion of discharge of cargo in London on the voyage with which I am concerned. Nevertheless, Casebourne, the expert engineer called on behalf of the defendants, whose evidence I found to be entirely reliable and carefully given, told me that there is nothing unusual in finding 40 to 50 gallons of water held up in an after hold after a coal cargo, and that, if the owners had been informed about the incident at the time, it would not have been reasonable to require them to fit a drain-well or sounding pipe forward. It was, in his view, quite possible that with the water entering slowly forward it may be prevented from draining aft through blockage by refuse of the drain holes in the frames. The most probable explanation, as it seems to me, is that the water was initially trapped forward in this way, and that as it seeped through to the after end of the hold it was held up by the close stowage of the cargo until finally the dam holding the water up was broken down in the course of discharge, and with the alteration of trim in the course of discharge it finally reached the soundings pipe. Whatever difficulties there may be in this explanation, they are not, in my judgment, sufficient to persuade me to disbelieve the evidence of fact given by the chief officer. I, accordingly, find that regular soundings were taken in No. 5 hold throughout the voyage.

For completeness I should add, though it is more strictly relevant to a later stage in this judgment, that I accept Casebourne's view based on his examination of the plans and on his inspection of the hold itself and his wide experience in matters of this kind, that this hold was in design reasonably fit for the carriage of cargo and had no peculiarity which required departure from the normal practice of having a drain-well and sounding pipe only at the after end of the hold.

I am now in a position to deal with the first question of law, namely, whether on proof that unseaworthiness has resulted from

the negligence of a workman employed by a competent ship repairer engaged by the shipowner, the result of whose negligence would not be discoverable by Lloyd's surveyors or the owners' marine superintendent carrying out their duties in accordance with the ordinary prudent practice of such persons, the shipowner should properly be held liable for failure to exercise due diligence to make the ship seaworthy.

Since the decision of the Court of Appeal in *G. E. Dobell & Co.* v. *Rossmore Steamship Co. Ltd.*[1]—a decision upon the effect of section 3 of the Harter Act, 1893, under which the shipowner is given certain statutory protection conditional upon the exercise by him of due diligence to make the ship seaworthy—it has been accepted that due diligence must be exercised "by the owner "himself or the agents whom he employs to see to the sea-"worthiness of the ship." The negligence in issue in that case was the negligence of the ship's carpenter in the direct employment of the shipowner, and no question of the negligence of a servant of an independent contractor arose or was discussed.

In *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.*,[2] one of the earliest decisions under the legislation of 1924 incorporating the Hague Rules, Wright J. took occasion to examine exhaustively the content of the obligation to exercise due diligence. In that case the plaintiffs' goods were damaged by oil fuel or the fumes therefrom leaking through into the cargo hold from an oil fuel bunker owing to a defective deck bar. The findings of fact are summarized thus[3]: "(1) The design of the bar and of "its fitting was inadequate and defective, and there should have "been a cofferdam, but these defects of design involved no "failure of due diligence on the part of any person concerned, "having regard to the fact that carriage of oil fuel in such "circumstances had not then been the subject of sufficient "experience and having regard to the existing current standard "of knowledge in such matters; (2) there was some bad work-"manship both in riveting and in fitting the bar to the bulkhead "which was entirely the fault of the individual workman "employed by the builders and could not have been detected by "any reasonable care on the part of the defendants' inspector, "or by Lloyd's inspector, or the Board of Trade inspector, or by "the builders' foremen; (3) the damage to the plaintiffs' cargo "was due to the defects of design, although it may have been "contributed to by the bad workmanship."

On these findings the judge stated the legal position to be as follows[4]: "The obligation of the carrier to exercise due "diligence to make the ship fit is clearly not limited to his "personal diligence. The carrier may be a company and, in any "case, in the complication of modern affairs and by reason of the "widely scattered situation of seaports, he must act by agents

[1] [1895] 2 Q.B. 408.
[2] [1927] 2 K.B. 456; 43 T.L.R. 675.
[3] [1927] 2 K.B. 458.
[4] Ibid. 460.

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" or servants, which is the phrase employed in article IV (2) (*q*). " The question is: How wide is the category of agents or " servants with reference to the obligation now being considered. " It is contended by the plaintiffs that, as the primary obligation on the carrier is to provide a seaworthy ship, the carrier " cannot delegate any part of that obligation so as to relieve " him of his personal liability, and he must accordingly be " accountable for lack of due diligence on the part of the " shipbuilders and their workmen, who are to be deemed to be " his agents, to make the ship seaworthy and fit, and that, " therefore, the defendants must be held liable for the bad " workmanship of which I have found the shipbuilder's men " guilty, and which I have not excluded as a contributing cause " of the actual damage. I do not think that this contention is " sound."

Then the judge deals with the history of the Act and its development, and continues[5]: " Under the old rule the only " relevant question was whether the ship was seaworthy or " unseaworthy. That rule was no doubt well adapted to more " simple days when ships were not very complicated wooden " structures of a few hundred tons, but in modern times, when " ships are complicated steel structures full of complex " machinery, the old unqualified rule imposed too serious an " obligation on carriers by sea, and I think that the new Acts " have intended to emphasize the specialization which has " developed in modern times and to emphaize the distinction " between carrier and shipbuilder, and limit the carrier's obligation to due diligence in his capacity as carrier. He is liable " for all such duties as appertain to a prudent and careful carrier " acting as such by the servants and agents in his employment. " If he has a new vessel built he will be liable if he fails to " engage builders of repute and to adopt all reasonable precautions. He may be held bound to require, for instance, the " builders to satisfy one of the well-known classification " societies, such as Lloyd's, or to engage skilled naval architects " to advise him and skilled inspectors to supervise the work. " In the same way, if he buys a ship he may be required to " show that he has taken appropriate steps to satisfy himself " by appropriate surveys and inspections that the ship is fit " for the service in which he puts her. But I do not think in " any case that the carrier can be held guilty of want of due " diligence simply because the builders' employees have put in " some bad work which, though concealed, renders the vessel " unfit.

" In the present case the defendants employed an inspector " to supervise the work. I have held that that inspector used " due diligence. It may well be that, if he had negligently " passed bad work which he saw, or even, perhaps, which he

[5] [1927] 2 K.B. 458, 461.

"ought to have seen, the carrier would be liable for want of "due diligence on the part of one to whom he had delegated "the task of inspecting the work, although such supervision, "it may be, cannot be other than general or go to every detail "of the workmanship. Similarly, the carrier might perhaps be "held liable if the naval architect whom he employed to super- "vise the design, applying current standards, failed to detect a "definite error in design, although I do not think that he would "be so liable for an error on the part of one of the classification "societies, such as Lloyd's, which occupy a public and quasi- "judicial position. He might also be liable if, either personally "or by his scientific advisers, he chose a special form of "construction which involved, according to current standards, a "known risk—for example, if he chose to dispense with a coffer- "dam so as to increase his cargo space although the best opinion "thought a cofferdam necessary. Again, the need of repairing "a ship may cast on the carrier a special duty to see, as far as "reasonably possible, by special advisers for whom he is "personally responsible, that the repairs adequately make good "the defects."

I have read that passage in full because, in my opinion, this judgment has since that date been accepted by the profession as stating the legal position authoritatively and accurately, and I have no doubt that the innumerable disputes between shippers and cargo owners have been settled on the basis of this judgment.

The passage in the judgment dealing with the shipowner's responsibility in the case of repairs effected by competent ship repairers was adopted and applied by Singleton J. in *C. H. Smith & Sons* v. *P. & O. Steam Navigation Co. Ltd.*[6] The only other reported case in which the decision in *Angliss*[7] has been affirmed so far as I know until recent years is the decision in *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*,[8] in the Privy Council, where Lord Wright said[9]: "What is meant in the (British) Sea Carriage of Goods "Act by due diligence to make the ship seaworthy was discussed "in *W. Angliss & Co.* v. *P. & O. Steam Navigation Co.*[10]: it is "not limited to personal diligence on the part of the owner." But I do not read Lord Wright's observations there as indicating that he was in any way resiling from the view which he had expressed as a judge of first instance in 1927.

It is argued, however, by the plaintiffs that a different view was expressed by Lord Wright in *Wilsons & Clyde Coal Co.* v. *English*.[11] The point for decision in that case was whether the appellants as mine owners, being under a common law duty to exercise reasonable care in the provision of a safe system of work, were to be held to have discharged that duty by the

[6] (1938) 60 Ll.L.R. 419, 423.
[7] [1927] 2 K.B. 456.
[8] [1934] A.C. 538; 51 T.L.R. 5.
[9] [1934] A.C. 538, 547.
[10] [1927] 2 K.B. 456.
[11] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

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appointment of a competent manager under section 2 (4) of the Coal Mines Act, 1911, the facts arising at a time when the doctrine of common employment was still applicable. The Court of Appeal in *Fanton* v. *Denville* [12] (a case dealing with the parallel duty as to the provision of plant) had held that the employer is only liable "if personal negligence is proved and "that if the failure to supply or maintain the plant or machinery "in a safe condition is due to the negligence of a manager to "whom the duty has been entrusted by the employer, the "employer is not responsible unless it can be shown he failed to "use reasonable care to select a competent manager, or that he "has in some way been guilty of personal negligence in con-"nexion with the instalment or maintenance of the machinery "or plant or in permittng the continuance of its use after he "became aware of its unsafe condition." Lord Wright, after discussing that case and the earlier decisions of the House, concludes as follows [13]: ". . . in truth the employer's obligation, as it has "been defined by this House, is personal to the employer and has "to be performed by the employer per se or per alios. If I may "take an analogy or instance of a similar personal obligation, I "note that the Carriage of Goods by Sea Act, 1924, requires a "shipowner to exercise due diligence or to take reasonable care to "provide a seaworthy ship. The shipowner is almost certainly "not an expert naval architect, engineer or stevedore. So far as "I know it has never been claimed that the obligation is fulfilled "by the shipowner taking reasonable care to appoint a competent "expert: the shipowner is absolutely held to the fulfilment of "the obligation. It is the obligation which is personal to him "and not the performance."

To the same effect are Lord Wright's observations in *Northumbrian Shipping Co.* v. *Timm* [14]: "The obligation to "make a ship seaworthy is personal to the owners, whether or "not they entrust the performance of that obligation to "experts, servants or agents. They cannot say that there was a "miscalculation merely due to the negligence of their servants." In neither of these cases does it appear that the *Angliss* case [15] was cited in argument; but I cannot believe that Lord Wright can have forgotten his decision in that case, or can have intended to throw any doubt upon its correctness.

In *Waddle* v. *Wallsend Shipping Co. Ltd.*,[16] Devlin J., following Wright J. in the *Angliss* case,[17] after being referred to *Wilsons & Clyde Coal Co.* v. *English*,[18] held,[19] on a claim by the widow of a deceased member of the crew of the *Hopestar* that the shipowners were not liable for a defect in design whether it was due to the builders or Lloyd's Register surveyors.

[12] [1932] 2 K.B. 309; 48 T.L.R. 433.
[13] [1938] A.C. 57, 80.
[14] [1939] A.C. 397, 403; 55 T.L.R. 770; [1939] 2 All E.R. 658.
[15] [1927] 2 K.B. 456.
[16] [1952] 2 Lloyd's Rep. 105.
[17] [1927] 2 K.B. 456.
[18] [1938] A.C. 57.
[19] [1952] 2 Lloyd's Rep. 105, 130.

I was also referred to a decision of my own in *International Packers (London) Ltd.* v. *Ocean Steamship Co.*,[20] in which I am reported to have said [21] as regards the obligation to exercise due diligence that the shipowner "cannot escape on proof that he "had employed a competent independent contractor who was in "fact negligent." I think that the reference to the *Angliss* case [22] which follows makes it clear that what I had in mind was the appointment of a competent independent surveyor. Though I have not preserved the notes of my judgment, I have read through my notes of the argument in that case, and it is clear that no submissions were made to me as to the position of an independent contractor or his servants. The use of that term by me in the judgment was either a slip or a mistake in reporting. I am quite clear I had not in mind the question of the negligence of the servant of an independent contractor such as a ship repairer or shipbuilder.

Accordingly, upon the authorities to which I have referred, I should have had little doubt about holding on the facts of the present case that the defendants should not be held liable for the casual negligence of the fitter employed by competent independent contractors such as Alex Stephens, when, as I have found, their own competent surveyor was not negligent in failing to detect this bad workmanship by the fitter.

However, Lord Wright's observations in *Wilsons & Clyde Coal Co.* v. *English* [23] have recently been considered by the Court of Appeal in *Davie* v. *New Merton Board Mills Ltd.*,[24] apparently without citation of his decision in the *Angliss* case.[25] In *Davie's* case [26] the question at issue was whether the employers were liable to the workman for injury sustained in the use of a tool purchased by the employer from competent suppliers, who in turn purchased the tool from a competent manufacturer, who in fact was negligent on the particular occasion in the manufacture of the tool in question. Jenkins L.J., in a dissenting judgment in favour of the workman, stated the legal proposition in terms wide enough to be fatal to the defendants in the present case. After referring to Lord Wright's speech in *Wilsons & Clyde Coal Co.*,[27] he said [28]: "If the law was, as it might quite reasonably "be, that an employer discharged his duty of taking reasonable "care to provide sound tools by having them made by a "reputable manufacturer or buying them ready made from reput-"able suppliers, the first defendants here could no doubt repel "the charge of negligence now brought against them by showing "that they bought the drift which turned out to be defective "from reputable suppliers, and that the defect was not one "which they could have discovered by reasonable inspection.

[20] [1955] 2 Lloyd's Rep. 218.
[21] Ibid. 236.
[22] [1927] 2 K.B. 456.
[23] [1938] A.C. 57, 80.
[24] [1958] 1 Q.B. 210; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67.
[25] [1927] 2 K.B. 456.
[26] [1958] 1 Q.B. 210.
[27] [1938] A.C. 57.
[28] [1958] 1 Q.B. 210, 231.

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"But the law as it is does not, as I understand it, accept reliance "on the care and skill of others as a performance of the duty. "Therefore (to apply Lord Wright's language) the first defen- "dants did not, in buying the drift from Baldwin & Co. Ltd., "perform the duty per se: nor did they perform it per alios, "since the second defendants unfortunately failed to take "reasonable care in the making of the drift."

Parker L.J., in referring to the principle stated in *Bain* v. *Fife Coal Co.*,[29] as approved in *Wilsons & Clyde Coal Co.*,[30] said[31]: "... it is, I think, clear that this principle holds good whether "the person employed by the master is a servant, a full-time "agent or an independent contractor. It is true that in *Wilsons'* "case the person under consideration was a manager employed "by the owner of a mine, but all that was said there is equally "applicable to the case of an independent contractor. Indeed, "Lord Wright gave as an illustration the case of a shipowner who "employed an expert naval architect, engineer or stevedore to "make his ship seaworthy—persons who in general would be "independent contractors." But later the Lord Justice states the proposition on the basis of which he decided in favour of the employer in the following terms[32]: "... it seems to me that "the plaintiff can only hold the defendants liable if the true duty "of a master is not merely to take reasonable care to provide "a reasonably safe tool, but to provide a tool which has been "manufactured with reasonable skill and care, even when the "manufacturer is in no contractual relationship with the master. "Unless constrained to do so by authority, I would be loth to "hold that there was any such duty. Subject only to a defect "latent to the manufacturer, and ordinarily this will not arise "by reason of his expert knowledge, such a duty would amount "to a warranty that the tool was safe."

Pearce L.J., in referring to Lord Wright's speech, said[33]: "Again, it is noticeable that Lord Wright in the passage which "I have read refers to the naval architect, the engineer, the "stevedores, as people for whose neglect the shipowner will find "himself vicariously liable. He does not refer to the ship- "builder. It seems to me unlikely that he was intending to "express a principle by which every subsequent purchaser of the "ship will be liable to his employee for some undiscoverable "defect due to the original negligence of the shipbuilder. By "undiscoverable defect I mean a defect that though patent to "the shipbuilder during the construction was not discoverable by "subsequent purchasers using reasonable care."

I have considered these judgments with anxious care, but I have come to the conclusion that they do not compel me to hold that the decision of Wright J. in the *Angliss* case[34] has been impliedly overruled. On the contrary, I think that the passage

[29] 1935 S.C. 681, 693.
[30] [1938] A.C. 57.
[31] [1958] 1 Q.B. 210, 238.
[32] Ibid. 239.
[33] Ibid. 248.
[34] [1927] 2 K.B. 456.

from the judgment of Parker L.J., which I have cited, reinforces the submission made to me on behalf of the defendants in the present case, that acceptance of the construction sought to be put on article III, rule 1, by the plaintiffs would be in effect to substitute for the new qualified obligation as to seaworthiness, the old absolute warranty of seaworthiness, except in rare cases of the true latent defect in the sense of defects not discoverable by care on the part of anyone. It would, in my view, be unfortunate if the development of the common law as to the employer's duty to his workmen, which resulted in part at least from the natural desire to avoid the harsh results of the doctrine of common employment before its repeal, led almost accidentally to an alteration in the content of the obligation of the shipowner towards the cargo owner, which had, as I believe, been authoritatively defined over 30 years ago.

I, accordingly, hold that the defendants have discharged the burden of proving that they exercised due diligence so far as concerns the inspection cover.

I now turn to the second allegation of unseaworthiness, namely, unseaworthiness by the design of the drainage and sounding arrangements in No. 5 hold. I have already stated earlier my acceptance of Casebourne's view that there was no such peculiarity in the hold in question as to require departure from the normal practice of fitting drainage-wells and sounding pipes in the after part of the hold. The vessel, with the hold in the present condition, has remained classified by the classification society since she became a cargo vessel on conversion in 1948, having passed through her initial and periodical surveys. According to the evidence of the ship's officers, which I accept, there was no previous record of cargo damage in this hold. I hold that the ship was not unseaworthy in design as alleged, and, further, that if, contrary to my finding, she was unseaworthy in that respect, I find that this was not due to any want of due diligence on the part of the defendants. I accept and apply the observation of Devlin J. in *Waddle* v. *Wallsend Shipping Co. Ltd.*,[35] that to require a shipowner to go behind the classification society's certificate would involve a retrogression beyond the point to which a reasonable shipowner can be expected to go.

I can also dispose shortly of the third allegation of unseaworthiness based upon close stowage. This contention, like the allegation last considered, depends wholly upon the alleged peculiarity of the hold in question. This I have negatived. I would add that there was no evidence, or no evidence acceptable to me, that the stowage was in any way improper. It was admittedly the normal stowage habitually employed at Australian ports for a general cargo such as the cargo in question. I, accordingly, negative unseaworthiness on this ground.

The conclusion which I have reached, that in fact the

[35] [1952] 2 Lloyd's Rep. 105, 130.

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soundings were regularly taken in No. 5 hold, makes it unnecessary that I should express a final view on the second main question of law, namely, whether failure to take soundings is covered by the exception in article IV, rule 2 (*a*) of "act, "neglect or default of the master, mariner or pilot or the "servants of the carrier in the navigation or in the management "of the ship." But, as it was indicated to me that this case may be considered by another court, and in view of the careful and exhaustive arguments which were addressed me on this point, it is probably convenient that I should deal with it.

I have recently had occasion in *International Packers (London) Ltd.* v. *Ocean S.S. Co. Ltd.*,[36] to review the relevant English authorities and certain American authorities on this question, and no useful purpose would be served in setting out my conclusions again in this judgment, especially as in the argument before me in the present case it was not suggested, as I understand it, that my appreciation of the authorities was erroneous. In the *Packers'* case [36] I came to the conclusion that the failure on the part of the ship's officers to fit locking bars over one of the hatches on the exposed weather deck at a time when severe weather was to be anticipated, fell within the exception, notwithstanding that the amount of water which in fact entered did not endanger the ship as such. I quote: "This failure resulted in "the failure of one of the ship's main defences against the entry "of sea water."

Broadly, the point may be put as follows: A ship at sea only keeps afloat by securing that sea water is not in the ship. This process involves (a) preventing the admission of sea water, for example, by having effective hatches and by properly securing the valves at the outlets at or near the sea level; (b) the taking of proper soundings to detect the presence of sea water, soundings being required whether the ship is in ballast or carrying cargo and being required not only for cargo holds, but also for any other compartments in which sea water may enter; and (c) pumping sea water out when it has been detected as having entered or, it may be, pumping periodically. Each of these operations, it is argued, is required for the ship, and their neglect is, to use the language of Greer L.J. in *Gosse Millard* v. *Canadian Merchant Marine* [37] (which was approved in the House of Lords) "neglect "to take reasonable care of the ship or some part of it as distinct "from the cargo," or, to use the language of Sir Francis Jeune P. in *The Glenochil* [38]: "A want of care of the vessel indirectly "affecting the cargo." Further, as regards soundings, it is said that the quality of the act, namely, whether it is neglect of the vessel or neglect of the cargo, cannot be determined by the extent of the water which would have been found if the soundings had been taken.

[36] [1955] 2 Lloyd's Rep. 218, 234.
[37] [1928] 1 K.B. 717; 45 T.L.R. 63; [1929] A.C. 223.
[38] [1896] P. 10.

I was usefully referred to a number of American decisions on this point arising under the Harter Act, 1893. The leading case in the U.S.A. is apparently *The Silvia*,[39] in which the Supreme Court, affirming Brown J.[40] and the New York Circuit Court of Appeals,[41] held, following *The Glenochil*,[42] that the failure of the ship's officers to fix iron covers inside the glass port holes, whereby in rough weather sea water entered the ship, was covered by the exception in question. Gray J., in delivering the judgment of the court, said that the words in question "include at the least the control during the voyage of "everything with which the vessel is equipped for the purpose "of protecting her and her cargo against the inroad of the seas; "and if there was any negligence in not closing the iron covers "of the ports, it was a fault or error in the navigation or "management of the ship. This view accords with the result "of the English decisions upon the meaning of these words." In passing I emphasize the words "during the voyage" and "for "the protection of her and her cargo against the inroad of the "seas" as distinguishing this judgment from the judgment of Scrutton L.J. which was disapproved in the House of Lords in the *Gosse Millard* case.[43]

In *The Mexican Prince*,[44] Brown J. (who was also the trial judge in *The Silvia*,[45] and, indeed, in most of the cases to which I was referred) held that failure to test a valve leading to a cargo hold before pumping out water from a neighbouring hold was within the exception as being a failure to use a means of safety provided by the owners. This decision was affirmed by the Circuit Court of Appeals[46] without a reasoned judgment, after the decision of the Supreme Court in *The Silvia*. Again, in *The British King*,[47] the same trial judge held that failure to take soundings and to apply the pumps was covered by the exception. This decision was also affirmed by the Circuit Court of Appeals,[48] again without a reasoned judgment, after the decision of the Supreme Court in *The Silvia*. See also *The Sandfield*[49] (failure to open sluice gate designed for emptying bilges). In *The Ontario*[50] Brown J. again held, following *The British King*,[51] that failure to keep pumps going to deal with a known accumulation of water was also within the exception, and, finally, in *The Merida*,[52] a Circuit Court of Appeals held that failure to take soundings and to use pumps for the removal of the water was within the exception.

The only English case to which I have been referred in which the failure to use pumps has been considered is *C. H. Smith &*

[39] (1898) 171 U.S.Rep. 462.
[40] (1895) 64 Fed.Rep. 607.
[41] (1895) 68 Fed.Rep. 230.
[42] [1896] P. 10.
[43] [1928] 1 K.B. 717.
[44] (1897) 82 Fed.Rep. 484.
[45] 64 Fed.Rep. 607.
[46] (1899) 91 Fed.Rep. 1003.
[47] (1898) 89 Fed.Rep. 872.
[48] (1899) 92 Fed.Rep. 1018.
[49] (1897) 79 Fed.Rep. 371; 93 Fed. Rep. 623.
[50] (1900) 106 Fed.Rep. 324.
[51] 89 Fed.Rep. 872.
[52] (1901) 107 Fed.Rep. 146.

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Sons v. *P. & O. Steam Navigation Co. Ltd.*,[53] in which Singleton J., having found that the shipowners had failed to exercise due diligence to make the ship seaworthy and were accordingly liable, also held that they were in breach of their obligation under article IV, rule 2 (*a*), in that the presence of sea water having been found, the officers failed to use the pumps to clear the water, and for that failure the shipowners were not protected by the exception. This decision, if sound, leads to the odd result that if the failure to take soundings is as the United States authorities suggest, an act, neglect or default in the management of the ship and, accordingly, the ship would have been protected if no soundings had been taken, yet if soundings are taken and disclose the presence of sea water, the ship is not protected if proper steps are not taken to remove the water found. It is not necessary for me to express any opinion as to the correctness of the decision of Singleton J. on this point, which may well be justified on the particular facts of that case. I can summarize my opinion as follows: If it had been necessary for me to express a concluded judgment on the question of whether the failure to take soundings was within the exception, I should on the authorities, both English and American, without doubt have held that it was. If, as I believe to be the case, the failure to secure the hatches on an exposed weather deck in rough weather, or when rough weather is to be anticipated, resulting in the absence of one of the main defences of the ship against the inroad of sea water, is within the exception, it would seem to me, as at present advised, logically and inevitably to follow that the failure to take soundings, which may result in dangerous quantities of sea water not being discovered, is also within the exception.

There must, accordingly, be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Clyde & Co.; Botterell & Roche.*

J. D. P.

[53] (1938) 60 Ll.L.R. 419.

[COURT OF APPEAL.]

C. A.

HUGHES *v.* HUGHES.

1958

June 16, 30; *July* 30.

Solicitor—Costs—Lien—Divorce—Whether absolute lien in divorce suit. Husband and Wife—Divorce—Public interest in—Solicitor's lien for costs.

Hodson, Morris and Sellers L.JJ.

A petitioner in divorce proceedings discharged his solicitors and instructed a second solicitor, who obtained the papers in the suit from the first solicitors subject to his undertaking to respect their

lien for costs. The petitioner subsequently discharged the second solicitor and instructed his present solicitors. On the application of the petitioner the registrar made an order that the second solicitor should deliver up the papers to the petitioner or his present solicitors within 14 days on the undertaking of the present solicitors to respect the lien of the first and the second solicitors. From this order the second solicitor appealed. Wrangham J. dismissed the appeal.

On a further appeal:—

Held, that the general rule—that a solicitor who was discharged by his client during a civil action, otherwise than for misconduct, was entitled to retain, as against his client, any papers in the case in his possession until his costs had been paid—applied whether the client's papers were of any intrinsic value or not; and that while divorce affected status and the public interest was involved, divorce proceedings inter partes were still civil litigation, and there was no reason why the rights of solicitors in such cases should differ from their rights in other cases. Accordingly, the second solicitor was entitled to his lien.

Per curiam. This lien should be preserved in the public interest in order that litigation may be properly conducted with due regard to the interest, not only of litigants, but also of the officers of the court who serve those interests.

Decision of Wrangham J. [1958] 2 W.L.R. 934; [1958] 2 All E.R. 366 reversed.

APPEAL from order of Wrangham J.[1]

On October 10, 1956, the petitioner presented a petition alleging desertion by his wife. He became dissatisfied with the solicitors who then acted for him and discharged them on November 11, 1957. They handed over the papers to a second solicitor, Mr. Edward Isaacs, subject to his respecting their lien for costs. On March 26, 1958, the petitioner discharged Mr. Isaacs. On March 31, 1958, Mr. Registrar Compton Miller made an order directing Mr. Isaacs to deliver the papers in his possession to the petitioner or his present solicitors within 14 days on the undertaking of those solicitors to respect the lien of the first firm of solicitors and of Mr. Isaacs. Against that order Mr. Isaacs appealed, contending that he had a lien upon the papers for his costs which he was entitled to assert without qualification.

Wrangham J. dismissed an appeal by Mr. Isaacs, holding that while the rule as to solicitor's lien for unpaid costs was unqualified where no other person than the client was interested, divorce proceedings were in the same category as actions in which third parties were interested, having regard to the public interest involved. He therefore disregarded the lien.

Mr. Isaacs appealed.

Roger Ormrod Q.C. and *S. E. Brodie* for the appellant.
Miss Anita Ryan for the petitioner.

At the conclusion of the argument of counsel for the appellant, counsel for the petitioner informed the court that, being convinced that the papers and documents in question were not necessary

[1] [1958] 2 W.L.R. 934; [1958] 2 All E.R. 366.

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for the success of the divorce petition, the petitioner withdrew his opposition to the appeal.

Counsel for the appellant asked the court, having regard to the importance of the issue, nevertheless, to pronounce judgment on the appeal.

The following cases were referred to in argument: *Colegrave* v. *Manley* [2]; *Commerell* v. *Paynton* [3]; *Heslop* v. *Metcalfe* [4]; *In re Hawkes* [5]; *Bozon* v. *Bolland* [6]; *Lord* v. *Wormleighton* [7]; *In re Faithfull* [8]; *In re Rapid Road Transit Co.* [9]; *In re Boughton* [10]; *Bclaney* v. *French* [11]; *Dessau* v. *Peter Rushton* [12]; *Boden* v. *Hensly.* [13]

Cur. adv. vult.

July 30. HODSON L.J. delivered the following judgment of the court: This is an appeal from an order of Wrangham J. affirming a decision of Mr. Registrar Compton Miller, dated March 31, 1958, directing a solicitor, Mr. Isaacs, to deliver to the petitioner's present solicitors, Adams & Co., the papers in his possession relating to the cause, the cause being a suit for divorce.

The question involved is an important one, although it is in the present case, as the petitioner now recognizes, of no significance, since there are said to be no papers in the possession of Mr. Isaacs which the petitioner cannot pursue his cause without. There is no evidence as to the nature of the papers in question except that they include an opinion of counsel and some draft particulars. Accordingly, the appeal has not been resisted, but the judgment must stand unless the appellant Isaacs succeeds in his contention that the order ought not to have been made, whether the petitioner himself takes any personal interest in the result of these apparently futile proceedings or not.

The petitioner originally instructed Elvy Robb & Co., but on November 11, 1957, he discharged this firm and instructed as his new solicitor Mr. Isaacs, who took over the papers, giving at the same time a written undertaking to respect the lien of Elvy Robb & Co. On March 26, 1958, the petitioner discharged Mr. Isaacs and subsequently instructed his present solicitors, Adams & Co. As a matter of history, the petitioner appears to have followed a managing clerk, who was at one time with Elvy Robb & Co., afterwards with Mr. Isaacs, from whose employment he was discharged in December, 1957, and is now in the employment of Adams & Co.

The importance of the question lies in this: Mr. Isaacs asserts that he has a lien upon such papers as there are in his possession,

[2] (1823) Tur. & Russ. 400.
[3] (1818) 1 Swan. 1.
[4] (1837) 3 Miln. & Craig 183.
[5] [1892] 2 Ch. 1.
[6] (1839) 4 Miln. & Craig 354.
[7] (1822) 1 Jacobs 580.
[8] (1868) L.R. 6 Eq.Cas. 325.
[9] [1909] 1 Ch. 96.
[10] (1883) 23 Ch.D. 169.
[11] (1873) L.R. 8 Ch. 918.
[12] [1922] 1 Ch. 1.
[13] [1892] 1 Ch. 101.

which he is entitled to assert against the petitioner without qualification.

There is no doubt that a solicitor who is discharged by his client during an action, otherwise than for misconduct, can retain any papers in the cause in his possession until his costs have been paid: see *In re Rapid Road Transit Co.*[1] This rule applies, as the authorities show, whether the client's papers are of any intrinsic value or not, although it would seem that so far as the solicitor's working papers are concerned, where the work has not been paid for by the client, the solicitor would not be compelled to hand over his work unless it had been paid for, apart altogether from the lien.

The authorities, however, draw no distinction between any particular class of papers, although no doubt the matter has until now only arisen for decision by the courts where there were some valuable or essential documents in question. Such have been held to include deeds, papers or other articles which are the property of the client and have come into the possession of the solicitor in the course of his professional employment, as, for example, a bill of exchange, letters patent, application for shares, a debenture trust deed, a policy of insurance and letters of administration.

The judge, however, while recognizing the rule as being unqualified where no other parties were interested, held that divorce proceedings were in the same category as actions in which third parties were interested, having regard to the public interest involved, and therefore disregarded the lien. It is true, as he said, that divorce affects status and the public interest is involved; but the fact remains that divorce proceedings inter partes are still civil litigation and we cannot see any compelling reason why the rights of solicitors should in such cases differ from their rights in other cases. The litigant need not change his solicitor without good cause. It would be odd if he were in effect able to get solicitors' work done for nothing by the simple expedient of changing his solicitor as often as he chose, leaving a trail of unpaid costs in his wake and demanding the papers without payment when he had no just cause to complain of the conduct of the solicitors instructed and discarded.

If he is hampered in the presentation of his case to his own disadvantage by having changed his solicitors without good cause, the public interest does not require that a litigant who seeks to put away his wife should be in a better position to obtain documents over which the solicitor has a lien than a litigant in any other civil proceedings.

It is true that there is an aspect of public interest which requires a full and complete investigation of the facts in a divorce case so that, whether or not the opposite party sets up a defence, the court will not grant a decree unless satisfied of certain

[1] [1909] 1 Ch. 96.

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matters. This duty is now imposed on the court by the Matrimonial Causes Act, 1950, and in this respect divorce proceedings differ in a material respect from other civil proceedings. This does not seem to us to involve the necessity of overriding the lien. It is true that the petitioner may be prevented from producing incriminating documents which would or might imperil his chances of success, such, for example, as correspondence between himself and his wife tending to show that a collusive bargain had been entered into to buy off a defence. In such a situation the petitioner's duty to refer to such documents would remain and he would be unable to produce them until he had satisfied the claim of his former solicitor. If the judge held that he could not pronounce a decree nisi in such a case, no injustice to the petitioner or the public would result. As the matter stands, we do not think there is an existing or potential third party interest which should override the solicitor's lien. This lien should be preserved in the public interest in order that litigation may be properly conducted with due regard to the interest, not only of litigants, but also of the officers of the court who serve those interests.

There is a subsidiary question, since the appellant has appealed against that part of the order which purports to relieve him of his undertaking to the first firm of solicitors. We agree with the judge that if the order were to stand, the appellant could not be held to have broken his undertaking if he were compelled by the court to hand over papers to the petitioner's latest solicitors. At the same time, we think that the appellant is correct in saying that there cannot be any jurisdiction to relieve him of an undertaking given by him to another solicitor. This is not a case where an undertaking having been given to the court, the undertaker can be relieved by the court itself from complying with the promise given.

The appeal is therefore allowed.

Appeal allowed.

Solicitors: *Edward Isaacs; Adams & Co.*

A. W. G.

[CHANCERY DIVISION.]

1958
July 7, 8, 9, 22.
Wynn-Parry J.

BULLOCK *v.* UNIT CONSTRUCTION CO. LTD.

[1956 J. 2142.]

Residence — Company — Income tax — Test of residence — "Superior or "directing authority"—Finance Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 34), *s.* 20 (9).

Three companies, which were wholly owned subsidiaries of Alfred Booth & Co. Ltd., a company resident in the United Kingdom, were at all material times registered and resident in East Africa. The

boards of the three subsidiaries were entirely distinct from the board of the parent company but the board of the parent exercised control in matters of policy and in effect told the boards of the African subsidiaries what to do and those boards always accepted the instructions and acted accordingly.

The respondent company, also a wholly owned subsidiary of Alfred Booth & Co. Ltd., made certain payments to the African subsidiaries which it claimed to deduct in computing its profits for the purposes of its assessments to income tax under Case I of Schedule D. It was admitted that if the African subsidiaries were resident in the United Kingdom within the meaning of section 20 (9) of the Finance Act, 1953,[1] then the payments in question were subvention payments which the respondent was entitled to deduct:—

Held, (1) that a company was resident where the superior or directing authority was; that authority being properly exercisable only within the framework of the constitution of the company.

Dicta of Evershed M.R. in *Union Corporation Ltd.* v. *Inland Revenue Commissioners* (1952) 34 T.C. 207, 271; [1952] W.N. 119; [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646 and of Dixon J. in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (1940) 64 C.L.R. 15, 241 applied.

(2) That the board of the parent company did not fall within the phrase "superior and directing authority," because the board of the parent company had no authority over the boards of the African subsidiaries, and because the boards of the African subsidiaries were not bound, under their respective constitutions, to accept such instructions.

(3) That the superior and directing authorities of the African subsidiaries could not, therefore, be said to exist in the United Kingdom authority because they were not resident there within section 20 (9) of the Finance Act, 1953.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the commissioners held on May 15, 17, 18 and 24, 1956, the Unit Construction Company Limited (hereinafter called "Unit") appealed against assessments to income tax made upon it under case I of Schedule D for the year 1953/54 in the sum of £110,000 less £36,388 capital allowances and for the year 1954/55 in the sum of £200,000 less £50,000 capital allowances.

The appeal concerned certain payments made by Unit, which Unit claimed to deduct in computing its profits for the purposes of the assessments under appeal. These payments comprised substantial sums paid to Booth & Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd. in 1952 and 1953.

The sole question in dispute was whether Booth & Co. (Africa) Ltd., Booth & Co. Ltd., and Bulleys Tanneries Ltd. were, in 1952 and 1953, companies resident in the United Kingdom within the meaning of subsection (9) of section 20

[1] Finance Act, 1953, s. 20 (9): "For the purposes of this section "'company' includes any body corporate, but references to a company "shall be taken to apply only to a "company resident in the United "Kingdom and carrying on a trade "wholly or partly in the United Kingdom. . . ."

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of the Finance Act, 1953. It was common ground that if they were so resident then the payments in question were subvention payments which Unit was entitled to deduct in computing its profits, by virtue of the said section 20.

The following facts appear from the case stated: Unit was a wholly owned subsidiary of Alfred Booth & Co. Ltd. Booth & Co. (Africa) Ltd., Booth & Co. Ltd., and Bulleys Tanneries Ltd. (which, when necessary to refer to them together, are hereinafter called "the African subsidiaries") were also wholly-owned subsidiaries of Alfred Booth & Co. Ltd.

It was admitted on behalf of Unit that the African subsidiaries were at all material times resident in East Africa.

Alfred Booth & Co. Ltd. was a company incorporated and resident in England, and was the parent of a group of ten or more companies trading in many parts of the world. It was incorporated in 1914 to carry on banking, merchanting and manufacturing businesses of all descriptions, and it did carry on a number of businesses in different parts of the world (including in particular building contracting, and businesses connected with the leather industry) all of which it had, by August, 1949, transferred to subsidiary companies incorporated for the purpose. In August, 1949, it adopted a new memorandum of association with the objects of an investment trust company, with power to carry on the business of banking.

The board of directors of Alfred Booth & Co. Ltd. met regularly in London. In addition to the board meetings, a committee of executive directors held weekly meetings in London. The chairman of the board of directors and of the executive committee was J. W. Booth; he had been a director since 1935; in May, 1950, he became a managing director (with special responsibility on the board and on the executive committee for the African subsidiaries); in July, 1952, he became chairman, and at the same time the special responsibility for the African subsidiaries was divided as under:—

J. W. Booth was responsible for their general trading and mining interests; E. Booth (another of the directors of Alfred Booth & Co. Ltd.) was responsible for their building interests; E. W. Espenhahn (another of the directors of Alfred Booth & Co. Ltd.) was responsible for their hide and skin and tanning interests.

The African subsidiaries, which were incorporated in 1948 and 1949 with the objects set out in their respective memoranda of association.

(a) *Booth & Co. (Africa) Ltd.* Building contracting in East Africa. A mining venture in Uganda. A forwarding agency at Mombasa, which acted principally as agent for the African subsidiaries themselves.

A merchanting business was carried on as a separate department under the name of Bulleys Trading Company.

(b) *Booth & Co. Ltd.* The business consisted in the earning

of commissions by purchasing hides and in the purchase and sale of skins, and was conducted through a number of posts set up in East Africa. In the case of hides, the company acted as agents for Hollander Hyams Ltd. (a company which had no connexion with the Alfred Booth & Co. Ltd. group of companies). This part of the business was governed by an agreement dated October 17, 1950, which allowed Booth & Co. Ltd. to supply a limited number of hides to Bulleys Tanneries Ltd. and other tanneries within the Alfred Booth & Co. Ltd. group of companies. In the case of skins the company acted as principals.

(c) *Bulleys Tanneries Ltd.* Manufacturing in Kenya leather for sale locally, and manufacturing or part-manufacturing leather for export to England, where the product was sold on behalf of Bulleys Tanneries Ltd. by Booth & Co. (England) Ltd.

Each of the African subsidiaries was incorporated in Kenya under the Kenya Companies Ordinance and has its registered office in Nairobi. The articles of association of each of them contained provisions placing the management and control of its business in the hands of its directors and providing that directors' meetings might be held anywhere outside the United Kingdom. It was the intention of the directors of Alfred Booth & Co. Ltd. (which intention they thought they had carried out) in forming the African subsidiaries that those companies should be solely resident in Africa in order that their profits could be used for development in Africa without becoming liable to United Kingdom taxation and also in order to forestall any question which might arise in connexion with any future nationalization, particularly of the building industry. It turned out, owing to disturbances in Kenya and other difficulties, that they incurred losses (except for the department known as Bulleys Trading Company, which made profits), and this was a source of great anxiety to Alfred Booth & Co. Ltd. which had sunk considerable sums of money in them, as it reflected on the financial position of the Alfred Booth group of companies as a whole. J. W. Booth, who was brought into the detailed control of the African subsidiaries, on his appointment as a managing director of Alfred Booth & Co. Ltd. in 1950, considered that the situation of the African subsidiaries was becoming so serious that it was unwise to allow them to be managed in Africa any longer, and that their management must be taken over by the directors of Alfred Booth & Co. Ltd. in London. He considered that his principal job was to manage them. The board of directors of Alfred Booth & Co. Ltd., after discussions, decided that as a result of the lack of success of the African subsidiaries they were forced to take over management and control, in order to save their company's investment; at the same time it was their policy to dispose of all or any of the African subsidiaries' undertakings if the opportunity should arise. There was at no time any formal agreement with the African subsidiaries that the

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directors of Alfred Booth & Co. Ltd. should manage them; the intention of the said directors to do so was communicated to one, P. Meinertzhagen (the chairman of the board of directors of each of the African subsidiaries), and accepted by him. As a result, from 1950 onwards the directors of Alfred Booth & Co. Ltd. in London began to intervene in the affairs of the African subsidiaries in the manner hereinafter set forth; they were aware that their action in so doing might affect the question of the residence of the African subsidiaries and their liability to United Kingdom taxation.

The chairman of the directors of each of the African subsidiaries was at all times P. Meinertzhagen. He had been (prior to 1948) an employee of Alfred Booth & Co. Ltd., in England, and went to Africa to form and supervise the African subsidiaries. He was not at any material time a director of Alfred Booth & Co. Ltd., he had no contract of service with any company in the group, and his remuneration took the form of a salary paid to him by Booth & Co. Ltd. (the other two African subsidiaries refunding Booth & Co. Ltd., part of it). He was described in the correspondence and in staff lists, as "Alfred Booth & Co. "Ltd., senior representative in East Africa."

The other directors of the African subsidiaries (who varied from time to time) were all persons employed by and holding contracts of service with the companies of which they became directors. Only one of them was a director of more than one of the African subsidiaries; this was one Trembath, who left in 1952, and was occasionally described or referred to as "Number "2" to Meinertzhagen. These directors were all elected to the boards of the African subsidiaries on the instructions of the parent company, Alfred Booth & Co. Ltd., and their contracts of service were made in London by Alfred Booth & Co. Ltd., as agent for the African subsidiary concerned. None of these directors was at any time a director of Alfred Booth & Co. Ltd. When occasion arose (as it did arise more than once) for removing one of them from office, the decision was taken in London by the directors of Alfred Booth & Co. Ltd., to determine his contract of service and remove him, and instructions to that effect were issued by Alfred Booth & Co. Ltd., to Meinertzhagen. When any question arose (as it did arise) of compensating a director or member of the staff of an African subsidiary for removal or dismissal, it was dealt with by the directors of Alfred Booth & Co. Ltd.; for this purpose they used Meinertzhagen as an intermediary, or as happened on one occasion, one of their number flew to East Africa to negotiate terms. The directors of the African subsidiaries did not all have access to all the documents of, or information concerning, the companies of which they were directors.

The minute books of the directors meetings of each of the African subsidiaries, recorded, in the main, only formal business (such as particulars of annual general meetings, appointments

and retirements of directors, secretaries and accountants, resolutions concerning the operation of banking accounts or the affixing of the companies' seals to documents and the acquisition or transfer of mineral claims or other property) at meetings held on irregular dates; in a few instances they recorded more important business, but in each such instance a decision had in fact been taken by the directors of Alfred Booth & Co. Ltd., in London and the record in the minute book of the African subsidiary merely formally records its implementation. Meinertzhagen is recorded as present at each such meeting, with one or two other directors; in many cases, however, the directors recorded as being present had not actually met at all and might not have known that any meeting was supposed to be taking place, as directors as a rule were not notified of any meetings. All the minutes purporting to record meetings prior to 1952 were written up in 1952, to comply with law, on the instructions of the directors of Alfred Booth & Co. Ltd. They were written up from records that had been typed and kept loose in a book by previous company secretaries. In most cases, where the minute book records a meeting and business transacted thereat, the business recorded was in fact transacted by Meinertzhagen (in all matters of any importance, on the instructions of Alfred Booth & Co. Ltd.) and the minute was written afterwards. In no case did the directors of any of the African subsidiaries sit round a table as a board, and they never either took any decision as a board, met as a board, or were summoned to meet as a board.

At all material times the boards of directors of the African subsidiaries did not and for all practical purposes could not manage and control the businesses of their respective companies. If they had tried to manage and control their companies' businesses (otherwise than in accordance with instructions from the directors of Alfred Booth & Co. Ltd.) Alfred Booth & Co. Ltd. would have removed them from office.

At all material times the whole of the trading policy of the African subsidiaries was dictated by the board of directors of Alfred Booth & Co. Ltd. and was implemented by Meinertzhagen as their senior representative and chairman of the African subsidiaries. Meinertzhagen was, however, consulted on occasions before a decision was taken, and from time to time he made submissions to the parent board on behalf of the African subsidiaries which were taken into account in determining future policy. He made two visits to London in 1952 and 1953, having been summoned to attend discussions with the directors of Alfred Booth & Co. Ltd., on various aspects of the affairs of the African subsidiaries. There were also occasions when a visiting director of the parent company consulted the local directors on the spot before deciding what he wanted to do.

Article 145 of the Kenya Companies Ordinance provides that every company shall keep at its registered office a register of its directors or managers, and provides for the case of registration

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of a corporation as a director or manager. Subparagraph (6) thereof provides that "... a person in accordance with whose "directions or instructions the directors of a company are "accustomed to act shall be deemed to be a director and officer "of the company." At no time was the name of Alfred Booth & Co. Ltd. or of any director of that company included in the register of directors of any of the African subsidiaries.

At all material times every aspect of the businesses carried on by the African subsidiaries was under scrutiny by the executive directors of Alfred Booth & Co. Ltd. at their weekly meetings in London.

The commissioners found (as a conclusion of fact from a great deal of detailed evidence before them) that the aim of the directors of Alfred Booth & Co. was to have a single efficient executive arm in East Africa capable of exercising day-to-day management of all the East African undertakings, which could be relied on to implement their own policy decisions without the necessity of frequent visits to Africa by themselves. In 1952 and 1953, the day-to-day management of the undertakings was broadly supervised by Meinertzhagen, who was responsible for local (East African) management within the instructions and limitations (financial and otherwise) imposed upon him by the directors of Alfred Booth & Co. Ltd.; the work involved imposed too great a burden on him in view of the particular difficulties existing at that time and the fact that the undertakings were spread between Kampala and Mombasa. In particular, they were anxious to have a reliable "Number 2" to him who could act during his absence.

The mining venture, which was in form one of the activities of Booth & Co. (Africa) Ltd., was in fact almost entirely managed from London. J. W. Booth authorized the purchase of a claim on a visit to Nairobi; after certain initial steps had been taken, it was financed entirely by Alfred Booth & Co. Ltd. without recourse to the African subsidiary's bankers; the decision to start mining was taken by the executive directors in London; they sent out an expert to advise and report on the mine, and they decided what the rate of production should be, how much labour should be employed and what vehicles should be used. The manager of the mine made reports from time to time direct to them, without going through the channel of Booth & Co. (Africa) Ltd.

The agreement with Hollander Hyams Ltd., under which Booth & Co. Ltd. disposed of most of its hides, was negotiated in London between Hollander Hyams Ltd. and Alfred Booth & Co. Ltd., as agents for Booth & Co. Ltd. In the day-to-day working of the agreement, Hollander Hyams Ltd. normally dealt directly with Booth & Co. Ltd.

In 1952 and 1953 it was part of the policy of the board of directors of Alfred Booth & Co. Ltd. to sell any of the assets or undertakings of the African subsidiaries if opportunity offered, and they supervised negotiations (mainly carried out on their instructions by Meinertzhagen in Africa) for selling the tannery

and, on another occasion, the mine. These negotiations proved abortive.

Throughout the material period the staff and officials of the African subsidiaries were making decisions concerning the day-to-day running of the trading activities of the African subsidiaries, within the general policy directions of Alfred Booth & Co. Ltd.

The United Kingdom subsidiaries of Alfred Booth & Co. Ltd. were managed by the parent company in the same way as the African subsidiaries. The company also has two subsidiaries in the United States of America which, however, are not subject to the same detailed control.

It was contended on behalf of Unit: (1) that each of the African subsidiaries was resident in the United Kingdom at all material times, within the meaning of section 20 (9) of the Finance Act, 1953; (2) that Unit was accordingly entitled to deduct the payments referred to above; and (3) that the assessments be reduced accordingly.

It was contended on behalf of the Crown: (1) that, as the African subsidiaries were admittedly resident in East Africa at all material times, they could not also at those times be resident in the United Kingdom; (2) that in any event none of the African subsidiaries were resident in the United Kingdom at any material time; and (3) that Unit was not entitled to the deductions claimed.

The commissioners who heard the appeal gave their decision as follows:

"We think, in addressing our minds to the question whether "the African subsidiaries were resident in the United Kingdom "in the material period, that the first question we have to "consider is what was the real situation regarding their manage-"ment and control.

"A number of (what have been described as) the acts of "interference in their management by the directors of Alfred "Booth & Co. Ltd. are equivocal, being equally well explained "as acts of parental or group control, or as the taking over of the "reins of management; others again are equivocal, being equally "well explained as the financial control of a creditor, or as the "taking over of the reins of management. . . .

"We find that the position was at the material times that the "boards of directors of the African subsidiaries (who are the "people one would have expected to find exercising control and "management) were standing aside in all matters of real import-"ance and in many matters of minor importance affecting the "central management and control, and we find that the real "control and management was being exercised by the board of "directors of Alfred Booth & Co. Ltd. in London.

"But it was contended on the part of the Crown that that "finding would not be enough to conclude the question before us; "it was said that there must be something more, that is, that "before we could find that the African subsidiaries were resident

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" in the United Kingdom, we must find control exercised here " under the constitution of the company concerned, by those " officers to whom such constitution gives it; in other words, the " Crown contended that we must find some ' formal ' control and " management here. We have considered this contention very " carefully and have come to the conclusion that the authorities " cited to us do not constrain us to accept it nor do they point " very strongly to the conclusion that it is right. On the contrary, " we notice that Lord Loreburn in his judgment in *De Beers Con-* " *solidated Mines Ltd.* v. *Howe* [2] directs attention to ' where the " ' central management and control actually abides,' and we think " it would be consistent with Lord Loreburn's reasoning to stress " the word ' actually.' In the course of the arguments before us " both sides relied on the remarks of Evershed M.R. in *Union* " *Corporation Ltd.* v. *Inland Revenue Commissioners*,[3] and in " particular on his reference to ' where the controlling power and " ' authority which, according to the ordinary constitution of a " ' limited liability company, is vested in its board of directors, " ' and the exercise of that power and authority, is to some sub- " ' stantial degree to be found.' [4] In the appeal before us, we find " the controlling power and authority, which according to the " constitution of each of the African subsidiaries is vested in its " board of directors, is actually exercised, to a very substantial " degree, by the board of Alfred Booth & Co. Ltd. in London. " We hold, on our understanding of the authorities, that once we " have found that as a fact, it is not necessary to go further and " inquire whether such power and authority is exercised under the " constitution of the company concerned by the officers to whom " such constitution gives it.

" For these reasons we find, and so far as it is a matter of law " we hold, that each of the African subsidiaries was resident in " the United Kingdom in 1952 and 1953. We do not think that we " are precluded from coming to this conclusion by reason of the " admitted fact that the African subsidiaries were at the material " times resident in East Africa, having regard to the judgment " of the Master of the Rolls in *Union Corporation Ltd.* v. *Inland* " *Revenue Commissioners*.[5] "

The points of law for the opinion of the court were: (1) whether there was evidence upon which the commissioners could arrive at their findings of fact; and (2) whether their conclusions were wrong in law.

Roy Borneman Q.C. and *Alan Orr* for the Crown.
Heyworth Talbot Q.C. and *J. Creese* for the taxpayer.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

[2] [1906] A.C. 455; 5 T.C. 198.
[3] [1952] 34 T.C. 207, 271; [1952] 2 T.L.R. 582; [1952] W.N. 119; [1952] 1 All E.R. 646.
[4] 34 T.C. 207.
[5] 34 T.C. 207.

July 22. WYNN-PARRY J. read the following judgment: In the case the special commissioners rightly pose the question as follows: "The sole question in dispute was whether Booth & "Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd. "were, in 1952 and 1953, companies resident in the United King-"dom within the meaning of section 20 (9) of the Finance Act, "1953."

In paragraph 4 of the case the special commissioners say: "It was admitted on behalf of Unit that the African sub-"sidiaries were at all material times resident in East Africa." Mr. Heyworth Talbot, on behalf of Unit, submitted that I should give no colour to that admission, because it could not be said with precision what were the grounds on which it was made or how far it was intended to go. I cannot accept this submission. A study of the case convinces me that the admission was not only proper, but inevitable. In my view, if it had been contended that the African subsidiaries were not resident in East Africa, the special commissioners would have been bound to find that they were resident in East Africa for taxation purposes. Not only were all those companies registered in East Africa, but they carried on business there; the members of the respective boards were resident there; and the articles of association provided in each case that the board meetings and general meetings of the company concerned could be held anywhere except in the United Kingdom. In short, every necessary step was taken to ensure that, having regard to the state of the authorities, if the residence of the African subsidiaries should become a material matter for consideration, the inevitable conclusion would be that they were each resident in East Africa.

The next, and indeed the main, submission put forward by Mr. Heyworth Talbot was that, as the special commissioners held, the African subsidiaries were also resident in the United Kingdom over the material period. As will be seen from the careful and exhaustive statement of the evidence on behalf of the respondents, which the special commissioners accepted, the board of directors of Alfred Booth & Co. Ltd. (the parent company) in effect told the boards of the African subsidiaries what to do, and those boards accepted the instructions and acted accordingly. In those circumstances, it is argued that the reality of the matter is that the real business of these companies is carried on in the United Kingdom as being the country where the central management and control abided. It is accepted by Mr. Talbot that this argument involves going further than any authority to be found in the books. I do not intend to multiply reference to authority, but I would say this. Speaking broadly, prior to *Swedish Central Railway Co. Ltd.* v. *Thompson* [1] the courts were concerned with cases in which the dispute was as to which one of two or more alleged places was to be regarded as the place where the company

[1] [1925] A.C. 495; 41 T.L.R. 385; 9 T.C. 342.

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concerned was to be regarded as resident. No question of dual residence arose. It is against that background that the cases prior to the *Swedish Railway* case [2] have to be considered.

In *De Beers Consolidated Mines Ltd.* v. *Howe* [3] Lord Loreburn said [4]: "Mr. Cohen propounded a test which had the merits "of simplicity and certitude. He maintained that a company "resides where it is registered and nowhere else. If that be so, "the appellant company must succeed, for it is registered in "South Africa. I cannot adopt Mr. Cohen's contention. In "applying the conception of residence to a company, we ought, "I think, to proceed as nearly as we can upon the analogy of an "individual. A company cannot eat or sleep but it can keep "house and do business. We ought, therefore, to see whether it "really keeps house and does business. An individual may be of "foreign nationality, and yet reside in the United Kingdom. So "may a company. Otherwise, it might have its chief seat of "management and its centre of trading in England, under the "protection of English law, and yet escape the appropriate taxa-"tion by the simple expedient of being registered abroad and "distributing its dividends abroad. The decision of Kelly C.B. "and Huddleston B. in *Calcutta Jute Mills* v. *Nicholson* [5] "and *Cesena Sulphur Co.* v. *Nicholson*,[5] now thirty years ago, "involved the principle that a company resides, for purposes of "income tax, where its real business is carried on. Those "decisions have been acted upon ever since. I regard that as the "true rule; and the real business is carried on where the central "management and control actually abides."

I desire to lay emphasis on the reasoning of Lord Loreburn which led him to state the rule as he did in the passage which I have quoted. It is, I think, to be found in the words: "Otherwise, "it might have its chief seat of management and its centre of "trading in England, under the protection of English law, and "yet escape the appropriate taxation by the simple expedient of "being registered abroad and distributing its dividends abroad." When Lord Loreburn says: "its chief seat of management," he must mean the company's chief seat of management, and not the seat of management of any other company: in other words, "the chief seat of management as set up within constitu-"tion of the company." If that be the true implication to be drawn from Lord Loreburn's words, then *De Beers Consolidated Mines Ltd.* v. *Howe* [6] does not help Mr. Heyworth Talbot.

To my mind, however, the matter does not rest on mere implication. There are two authorities, both Court of Appeal decisions, which I regard as negativing the proposition which Mr. Talbot puts forward, and as supporting the view that in order that a company resident abroad can claim the benefit of residence in this country, it must be shown that the Acts relied

[2] [1925] A.C. 495.
[3] [1906] A.C. 455; 5 T.C. 198.
[4] [1906] A.C. 455.
[5] (1876) 1 Ex.D. 428.
[6] [1906] A.C. 455.

on as constituting such residence were done within its constitution. If they were not so done, they are not the acts of the company, and are not to be taken into consideration. The first of the two authorities is *Stanley* v. *The Gramophone and Typewriter Ltd.*[7] In that case the company held all the shares in a German subsidiary. The German subsidiary was not shown to be a mere simulacrum of the English company, the mere existence of a power of ultimate control not being held sufficient to lead to such a conclusion. In the course of his judgment Lord Cozens-Hardy M.R.[8]: "The German company was established "in Germany in 1900 in accordance with German law. It was "undoubtedly a company with several shareholders who brought "in considerable capital. One of those shareholders was an "English company, whose undertaking was subsequently "acquired by the present English company. At some date "which is not stated, the English company acquired all the "shares of the German company, and I assume in favour of the "Crown that this event had happened before the material dates. "The fact that an individual by himself or his nominees holds "practically all the shares in a company may give him the control "of the company in the sense that it may enable him, by "exercising his voting powers, to turn out the directors and to "enforce his own views as to policy, but it does not in any way "diminish the rights or powers of the directors, or make the "property or assets of the company his as distinct from the "corporation's. Nor does it make any difference if he acquires "not practically the whole, but absolutely the whole of the "shares. The business of the company does not thereby become "his business. He is still entitled to receive dividends on his "shares, but no more. I do not doubt that a person in that "position may cause such an arrangement to be entered into "between himself and the company as will suffice to constitute "the company his agent for the purpose of carrying on the "business, and thereupon the business will become for all taxing "purposes his business. Whether this consequence follows is in "each case a matter of fact. In the present case I am unable "to discover anything in addition to the holding of the shares, "which in any way supports this conclusion. The German "company was not at first, and there is no evidence that it has "ever become, a sham company or a mere cloak for the English "company. It has its board of management and its board of "supervision as required by the German law. Its accounts are "made out in accordance with German law. On the other hand, "the English company has its board of directors, some of whom "are on the German board. It has a proper account and balance "sheet in which its interest in the German company is described "accurately as so many shares in the German company, and the "gross profits of the German company are in no way brought

[7] [1908] 2 K.B. 89; 5 T.C. 358. [8] [1908] 2 K.B. 89, 95, 96.

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"into the profit and loss account of the English company. "Against this the only thing to be said is that the chairman of "the English company made a foolish speech in which he treated "the gross profits of the German company as profits of the "English company; but the dividend declared by the English "company did not proceed upon this footing. In my opinion it "would be wrong to attribute to the loose and inaccurate language "of the chairman a force sufficient to override the formal acts "of both the English company and the German company and "all the other circumstances of the case."

Buckley L.J., in a well-known passage, said [9]: "Further, it "is urged that the English company as owning all the shares can "control the German company, in the sense that the German "company must do all that the English company directs. In my "opinion this again is a misapprehension. This court decided not "long since in the *Automatic Self Cleansing Filter Syndicate Co. "Ltd.* v. *Cuninghame* [10] that even a resolution of a numerical "majority at a general meeting of the company cannot impose its "will upon the directors when the articles have confided to them "the control of the company's affairs. The directors are not ser- "vants to obey directions given by the shareholders as individuals; "they are not agents appointed by and bound to serve the share- "holders as their principals. They are persons who may, by the "regulations, be entrusted with the control of the business, and if "so entrusted they can be dispossessed from that control only by "the statutory majority which can alter the articles. Directors "are not, I think, bound to comply with the directions even if "all the corporators acting as individuals. Of course the cor- "porators have it in their power by proper resolutions, which "would generally be special resolutions, to remove directors who "do not act as they desire, but this in no way answers the "question here to be considered which is, whether the corporators "are engaged in carrying on the business of the corporation. In "my opinion they are not. To say that they are involves a "complete confusion of ideas. The enquiry may be put in "another form by asking who would be liable upon the contracts "of the German company? Obviously the German company, "and not those who are the holders of its shares."

The second authority is *Union Corporation Ltd.* v. *Commissioners of Inland Revenue*.[11] In this case Lord Evershed M.R. gave the judgment of the court and, after an exhaustive review of the authorities, laid down a test for ascertaining whether or not it could be postulated of a company that it was resident in more than one place. It is true that, strictly speaking, his judgment on this point was obiter, but, given as it was after so much careful consideration, I should feel myself bound to accept it, apart from the circumstance that, if I may say so with respect,

[9] [1908] 2 K.B. 89, 105, 106.
[10] [1906] 2 Ch. 34.
[11] [1952] 34 T.C. 207; [1952] W.N. 119; 1 T.L.R. 651; [1952] 1 All E.R. 646.

I wholly agree with it. I need cite only one passage [12]: "The "company may be properly found to reside in a country where "it 'really does business,' that is to say, where the controlling "power and authority which, according to the ordinary consti- "tution of a limited liability company, is vested in its board of "directors, and the exercise of that power and authority, is to "some substantial degree to be found. In our judgment, the "formula 'where the central power and authority abides' does "not demand that the court should look, and look only, to the "place where is found the final and supreme authority.

"We have upon this difficult question derived great assistance "from the judgment of Sir Owen Dixon in the Australian case of "*Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of* "*Taxation*,[13] where the same problem was fully considered by "that learned judge and by the full High Court of Australia. "We cite one paragraph from Dixon J.'s judgment [14]: 'The "'better opinion, however, appears to be that a finding that a "'company is a resident of more than one country ought not to "'be made unless the control of the general affairs of the com- "'pany is not centred in one country but is divided or distributed "'among two or more countries. The matter must always be "'one of degree and residence may be constituted by a combina- "'tion of various factors, but one factor to be looked for is the "'existence in the place claimed as a residence of some part of "'the superior or directing authority by means of which the "'affairs of the company are controlled.' We accept and "respectfully adopt that passage as accurately stating the "solution of the problem."

In my view this passage is conclusive of the question before me. In the first place, the words of the Master of the Rolls,[15] "that is to say, where the controlling power and authority which, "according to the ordinary constitution of a limited liability "company, is vested in its board of directors, and the exercise "of that power and authority is to some substantial degree to "be found," indicate to my mind that he was contemplating only an exercise of authority which could properly be exercised within the framework of the constitution of the company concerned. This conclusion is, I think, inevitable when one considers the phrase used by Dixon J., "the superior or directing autho- "rity." In that context "authority" must have a narrower meaning than "power." It must connote something which has been regularly established, and because of that regular establishment is entitled and able to exercise direction. To my mind, the board of the parent company cannot fall within the phrase "superior or directing authority." As such it has no authority over the boards of the African subsidiaries. True, those boards may accept the instructions of the board of the parent company; but they are not bound to do so. It may be that they do accept

[12] 34 T.C. 207, 271.
[13] 64 C.L.R. 15.
[14] (1940) 64 C.L.R. 15, 241.
[15] 34 T.C. 207, 271.

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instructions, because failure to do so would result in dismissal, but acceptance in fact of such instructions does not mean that the board of the parent company have authority to give the instructions. As I have said, they have no such authority. It must follow, to my mind, that in applying the test adumbrated by the Master of the Rolls no weight or attention can be given to the activities of the board of the parent company in relation to Unit and the African subsidiaries for the purpose of considering whether or not any of them are resident in the United Kingdom. In the result it cannot be said that any part of the superior and directing authority of these companies can be said to exist in the place claimed as a residence, namely, the United Kingdom. Further, even if "authority" could be regarded as being synonymous with "power," the word "power" in the context would have to be read as "power regularly exercised."

If I have, as I hope is the case, rightly understood the test propounded by the Master of the Rolls, then there is furnished for the guidance of those interested in these matters a test clearly defined in its scope (and founded, if I may say so, on principles of common sense), with the result that certainty is achieved, the only possible difficulty (though hard to foresee) being in its application in a given case. If, on the other hand, Mr. Talbot's proposition were to be accepted, certainty goes, and the court would have to take into consideration, as material statements for the purpose of answering such a question as is posed here, acts (in this case the acts of the board of the parent company) which, on the reasoning in the *Gramophone* case,[16] must be regarded as irregular interference by a parent company in the affairs of a subsidiary.

In the result, in my view, the appeal succeeds and must be allowed with costs.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Herbert Smith & Co.*

P. P.

[16] [1908] 2 K.B. 89.

[COURT OF APPEAL.]

C. A.

1958
July 24, 25.

Jenkins, Parker and Pearce, L.JJ.

MEYER *v.* LEANSE.

[Plaint No. N. 159.]

Arbitration—County court—Powers of judge—Application to set aside arbitrator's award — Scope of judge's discretion — County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 89 (1) (3) (*as amended by Administration of Justice Act*, 1956 (4 & 5 *Eliz.* 2, *c.* 46), *s.* 31 (4)).

The plaintiff let to the defendant a furnished house, on the terms that the defendant should keep the demised effects and

premises in the same order as they then were and should so surrender them on the expiration of the term a reasonable use and wear and tear excepted. A dispute arose regarding dilapidations which was referred to arbitration pursuant to section 89 of the County Courts Act, 1934.[1] The plaintiff claimed £314; the arbitrator awarded £92, as he considered that much of the dilapidations constituted fair wear and tear and that in any event the premises required a thorough redecoration which ought not to be charged to the defendant.

The plaintiff applied to the county court judge to set aside the award, on the ground that there were errors of law on its face. The judge held that there were no such errors of law, but that the plaintiff had suffered a serious injustice in that it appeared that the arbitrator had acted in some degree on theory and not on evidence. He held that the power conferred by section 89 (3) on a county court judge to set aside an award "if he thinks fit" gave a wide discretion which ought to be exercised under the circumstances, and he set aside the award. On appeal:—

Held, allowing the appeal, that in the exercise of his powers under section 89 (3), a county court judge had no wider discretion than the High Court when setting aside an award and must act upon the same principles.

Brown v. *Dean* [1910] A.C. 373 applied.

Per Parker L.J. There appears to be no express power under section 89 (3) to remit an award; that is an unfortunate omission, as such a power is really essential for the proper working of the section.

APPEAL from Judge Leon, sitting at Willesden County Court.

Under an agreement in writing dated August 4, 1954, the plaintiff let to the defendant certain furnished premises for six months as from July 6, 1954. By reason of a further agreement and by holding over the defendant remained in occupation of those premises until May 4, 1956. Throughout that period it was a term of the tenancy that the defendant should "take "due and proper care of the demised furniture and effects and "to keep the same and the said premises and garden and the "fixtures and conveniences thereto in the same state and con- "dition as they now are and so surrender the same at the "expiration or sooner determination of the tenancy reasonable "use and wear and tear and damage by accidental fire ex- "cepted"; and also should "pay for the cleaning or washing "of such blankets counterpanes curtains covers and other "articles as may require washing or cleaning at the expiration "or sooner determination of the tenancy to leave clean the "chimneys and windows and to make good all such articles

[1] County Courts Act, 1934, s. 89 (as amended by the Administration of Justice Act, 1956, s. 31 (4)): "(1) The "judge may, with the consent of the "parties to any proceedings, order the "proceedings to be referred to arbitra- "tion . . . to such person or persons "and in such manner . . . as he thinks "just and reasonable. . . . (3) On any "such reference the award of the arbi- "trator . . . shall be entered as the "judgment in the proceedings and "shall be as binding and effectual to "all intents as if given by the judge: "Provided that the judge may, if he "thinks fit . . . set aside the award, "or may, with the consent of the par- "ties, revoke the reference or order "another reference to be made in the "manner aforesaid."

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"as may become broken lost chipped stained cracked or otherwise injured during the tenancy or at the option of the landlord to pay for the same."

After the tenant had left the premises disputes arose as to the amount of the dilapidations, and in due course the plaintiff commenced these proceedings in the county court claiming damages. The damages claimed were £314 8s. 6d., and broadly speaking could be classified under three heads: (1) the cost of making good the decorations, (2) cleaning, etc., of the soft furnishings, and (3) damage to furniture.

The matter was referred under section 89 to arbitration, and one Jones, an experienced surveyor, was appointed arbitrator. The hearing took four days, April 29 and 30, on May 1 the arbitrator inspected the premises, on May 3 he continued the hearing, and finally on September 18 he had a special hearing to hear argument in regard to costs. By his award of September 20, 1957, the arbitrator awarded the plaintiff damages in the sum of £92 9s. as against the sum claimed. That sum of £92 9s. was mainly in regard to the second and third heads of claim. With regard to the first head in respect of the decorations, he took the view that by May 4, 1956, when the defendant left the premises, they needed general redecoration as the result of fair wear and tear, and that such damage as the defendant had done over and above fair wear and tear would be made good without extra cost in the general redecoration. Accordingly, the arbitrator came to the conclusion that the plaintiff had not proved any damage under that head. He did, however, allow something in respect of cigarette burns which he felt would not be made good in the general redecoration, and he also allowed something in respect of a back lobby, which had been completely redecorated just before the defendant went into occupation. He went on to say that if the conclusion that he had come to, namely, that the plaintiff had not shown that he had suffered any damage under that head, was wrong in law, he would have awarded the sum of £65. Finally, in regard to costs he only awarded the plaintiff a third of his costs, taking the view that the claim was exaggerated and that in regard to the first head, the damage to the decorations, the plaintiff's claim had failed.

On September 30, 1957, the plaintiff landlord gave notice of an application to the county court under the proviso to subsection (3) of section 89 to set aside the award of the arbitrator. It was based on two grounds; first, that there was an error of law on the face of the award in the arbitrator's holding that no damage had been shown, and, secondly, that there was an error of law disclosed in that the arbitrator had deprived the plaintiff of two-thirds of his costs. The matter came before the county court judge on March 6, 1958, when he held that there was no error on the face of the award either in respect of the arbitrator's decision in regard to the decorations or in

regard to his decision in respect of costs. He, however, came to the conclusion that his discretion to set aside an award under subsection (3) of section 89 was wider than the High Court had under the Arbitration Act of 1950 or under its inherent jurisdiction. The judge held that he could set aside an award if he felt that there might be a serious injustice.

In his award the arbitrator had said this in regard to the head: Decorations: "I find that the house was redecorated "in 1950 and that these decorations could not be expected "to last more than seven years in property of this type, although "I consider that five years would be a more reasonable estimate "of their life. It therefore follows that the house was due "for redecoration by the time the defendant yielded up possession, and such markings as the defendant may have made "would not worsen the plaintiff's position. All decorations were "covered by a 'fair wear and tear clause' in the lease, and "the reparation of such fair wear and tear would correct any "damage which may have been done by the defendant without "extra cost to the plaintiff. I therefore find that the plaintiff "has failed to prove that any damage has been suffered."

As to that finding the county court judge said: "If the "arbitrator had only said that he had inspected the house (as "he had on May 1, 1957) and that he was satisfied from its "condition on his inspection and from the evidence called before "him that it required redecoration on the surrender by the "defendant by reason of fair wear and tear, apart altogether "from the additional damage, his award on this point could "not be criticized. But he has not simply said that. It was "common ground that nothing had been done to the premises "since the delivery up of possession in order that the arbitrator "might see its actual condition. It should, therefore, have "been perfectly simple for an arbitrator, who is a surveyor, "to base his findings substantially on what he saw. But the "first two sentences of the paragraph headed: 'Decorations' "strongly suggest at any rate that the arbitrator was basing "his finding that redecoration was necessary in any event by "theorizing. He finds that the house was redecorated in 1950 "and then proceeds apparently to arrive at his conclusion by "what normally would happen with a house of that type. "Houses and decoration vary and so does the weather. Any "one house may require redecorating sooner than another for "a variety of reasons. Where the house is not available for "inspection it is only possible to come to a decision upon the "probabilities. But where a house is available for inspection "theorizing appears to me to be quite irrelevant. The arbitrator was in a position to say from his inspection whether the "house needed redecoration." Then later he said this: "Now "an award by a non-legal arbitrator is not to be read too "closely for niceties of language, but, even bearing that in "mind, I feel bound to say that the way in which the arbitrator

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"appears from the form of his award to have arrived at his "decision is unsatisfactory and may do a serious injustice to "the plaintiff. In these circumstances I am satisfied that if "I have a general power to set aside the award it ought to "be set aside, but I am not satisfied that the plaintiff has "established that there is an error of law appearing on the "face of the award. The onus is upon him to satisfy me as "to this and he has not done so. It is one thing to find an "award couched in unsatisfactory language which shows that "an injustice has been or may have been done. It is another "thing to be satisfied that the award contains a patent error "of law." Having so held, he went on to hold that in fact he had a general discretion under the section. He summarized the matter thus: "But where, as in this case, a judge considers "that a serious injustice may have been done to one of the "parties, he will certainly be entitled to exercise his discretion "to set aside an award."

The tenant appealed.

John Davies for the tenant.

A. R. Barrowclough for the landlord.

Cases referred to in argument which are not mentioned in the judgments: *Morgan* v. *Mather*[2]; *Kiril Mischeff Ltd.* v. *Constant Smith & Co.*[3]; *Simpson* v. *Inland Revenue Commissioners*[4]; *Hanson* v. *Newman*[5]; *Owen* v. *Nicholl*[6]; *R.* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*[7]; *W. Hughes & Son* v. *Satchell*[8]; *Harris* v. *Petherick.*[9]

JENKINS L.J. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. This is an appeal from a judgment of His Honour Judge Leon sitting at Willesden County Court on March 6, 1958, setting aside the award of an arbitrator in a reference by consent under section 89 of the County Courts Act of 1934. It is convenient to refer at the outset to the terms of that section. It is in these terms (as amended): "(1) The judge may, with the consent "of the parties to any proceedings, order the proceedings to be "referred to arbitration (whether with or without other matters "within the jurisdiction of the court in dispute between the "parties) to such person or persons and in such manner and on "such terms as he thinks just and reasonable. (2) No such

[2] (1792) 2 Ves.Jun. 15.

[3] [1950] 2 K.B. 616; 66 T.L.R. (Pt. 1) 742; [1950] 1 All E.R. 890.

[4] [1914] 2 K.B. 842; 30 T.L.R. 436.

[5] [1934] Ch. 298; 50 T.L.R. 191.

[6] [1948] W.N. 138; [1948] 1 All E.R. 707.

[7] [1951] 1 K.B. 711; [1951] 1 T.L.R. 270; [1951] 1 All E.R. 268 (Divl.Ct.); [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122 (C.A.).

[8] (1925) 134 L.T. 93.

[9] (1879) 4 Q.B.D. 611.

" reference shall be revocable by any party except with the con- " sent of the judge. (3) "—which is the important subsection here—" On any such reference the award of the arbitrator, " arbitrators or umpire shall be entered as the judgment in the " proceedings and shall be as binding and effectual to all intents " as if given by the judge: Provided that the judge may, if he " thinks fit, on application made to him within such time as may " be prescribed by County Court Rules, set aside the award, or " may, with the consent of the parties, revoke the reference or " order another reference to be made in the manner aforesaid."

This case raises interesting questions as to the exact powers given to a county court judge under subsection (3), which is substantially in the same terms as section 77 of the County Courts Act of 1846. [His Lordship stated the facts, and continued:]

Against that judgment the defendant tenant appeals to the court, and Mr. Davies on his behalf makes two submissions: first, that the judge was wrong in holding that he had a general discretion to set aside. He could, says Mr. Davies, only set aside the award on the same grounds as would entitle the High Court to set aside an award, namely, for an error of law or for misconduct or for an improper procuring of an award. Secondly, and in the alternative, he says that even if the judge had a wider discretion, it was wrongly exercised in the present case in that it was based on a fallacious assumption, namely, that the arbitrator might have based his finding entirely on theory and might have ignored the actual condition of the premises which he undoubtedly saw on his inspection on May 1.

The plaintiff landlord, on the other hand, puts in a counter notice and Mr. Barrowclough on his behalf makes two submissions: (1) that the arbitrator's award in regard to these decorations discloses an error of law on its face, and (2) that the finding in regard to costs also shows an error of law.

It is convenient, I think, to deal first with the plaintiff's contention because if there is an error of law manifest on the face of this award, then I do not think that anybody could be heard to suggest that there was not ample power to set the award aside. For my part, like the judge, I am not satisfied that there is any error of law manifest on the face of the award in the sense that that expression has been used. It certainly cannot be asserted that the whole or a proportion of the cost of making good damage is necessarily the test. The measure must vary from case to case according to the exact facts. But Mr. Barrowclough, while I think agreeing with that, says that here it is shown that the arbitrator made the wrong approach; that he was finding, as he did, on a theory that decorations only last so many years and that, accordingly, when that number of years is up, the premises require redecoration; only, says Mr. Barrowclough, if he had said that having examined the premises he had come to the conclusion that the whole of the premises required complete redecoration and that such damage as

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the tenant had done had not made any additional damage to the premises, would the finding be justified.

I am not prepared to adopt the view that he did ignore what he found at his view. After all, either what he saw confirmed the theory or it did not, and if it did not confirm the theory, then this arbitrator was guilty of grave misconduct, for which, as I see it, there is no real warrant. Indeed, the approach that the court makes to an award has always been to support the validity of the award and to make every reasonable intendment and presumption in its favour, and I cannot think that this experienced surveyor did intend to base his finding entirely on theory; indeed, he must have been influenced by what he saw in his apparently very careful inspection of the premises. As regards the question of costs, I, again like the judge, am quite satisfied that whatever view one might have taken oneself in regard to the award of costs, it certainly cannot be said that in doing what he did the arbitrator erred in law.

Accordingly, I pass to the first, and the more interesting I think, of the points involved, namely, whether the county court judge under the section has a wider discretion than has the High Court in regard to the setting aside of an award such as this. As I have already said, this power to set aside first appeared in the Act of 1846 and in substantially the same form. At that time the position of the higher courts in regard to awards was, I think, this. The only statutory power to set aside was to be found in the Arbitration Act of 1698 in these terms: "And be it further "enacted by the authority aforesaid that any arbitration or "umpirage procured by corruption or undue means shall be "judged and esteemed void and of none effect, and accordingly "be set aside by any court of law or equity." At the same time the court had always exercised its inherent jurisdiction at common law to set aside an award for misconduct. That inherent power was made statutory in the Arbitration Act of 1889, and in 1802, as the county court judge points out, in *Kent* v. *Elstob*,[1] the court asserted power to set aside awards for errors of law. Moreover, at the time of the County Courts Act, 1846, there was no power to order a special case on a point of law. That, I think, was first given by the Act of 1889 and also there was, as I understand it, no general power to remit; indeed, that power to remit was first given by the Common Law Procedure Act of 1854. In *Hodgkinson* v. *Fernie*,[2] Cockburn C.J. said this: "The only re- "maining question is whether or not the court is called upon to "interfere by reason of the 8th section of the Common Law Pro- "cedure Act, 1854, 17 & 18 Vict. c. 125. It is true that section "gives the court authority, in any case where reference shall be "made to arbitration, at any time, and from time to time, 'to "'remit the matters referred, or any or either of them, to the "'re-consideration and re-determination of the said arbitrator,

[1] 3 East 18.

[2] (1857) 3 C.B.(N.S.) 189, 201.

" ' upon such terms, as to costs and otherwise, as to the said " ' court or judge may seem proper.' I am, however, clearly of " opinion that it was not intended by that enactment to alter the " general law as to the principles upon which the courts had been " in the habit of acting in determining whether they would or " would not set aside awards; but merely to give the court power " to remit the matter to the arbitrator for re-consideration in all " cases, though the submission should not contain that extremely " useful clause giving them that power, where it turned out that " there was a fatal defect in the award, but of such a nature as " not to render it expedient to set aside the award, and thus " render nugatory all the expense that had been incurred under " the reference."

The judge felt that the failure of Parliament in the Act of 1846 to lay down the limits of the powers disclosed an intention to leave it completely at large, and the words " if he thinks fit " supported, he thought, that view. Thus he said: " It would " have been perfectly simple for Parliament in 1846 to provide " in section 77 the grounds upon which an award could be set " aside, as was provided in the Act of 1698 or as was later enacted " in the various Arbitration Acts. But it did not do so. It left " on the face of it an unfettered judicial discretion to the judge " to set aside ' if he thinks fit.' "

With all respect to the county court judge, I am unable to take the same view. The failure of Parliament to do in regard to the jurisdiction of the county court what it had failed to do in regard to the jurisdiction of the High Court is, in my judgment, no ground for saying that it intended to confer on the county court a different and wider jurisdiction. It must be remembered that the courts were in those days far less inclined to interfere with awards than today. In those days misconduct, to justify setting aside an award, had to be what I may call real as opposed to technical misconduct, and, indeed, a manifest error of law had only then recently been held to be a ground for setting aside an award, a matter which, incidentally, many judges regretted. Indeed, in *Hodgkinson* v. *Fernie*, to which I have referred, Williams J. said this[3]: " The law has for many years been " settled, and remains so at this day, that where a cause or " matters in difference are referred to an arbitrator, whether a " lawyer or a layman, he is constituted the sole and final judge " of all questions both of law and of fact. Many cases have fully " established that position, where awards have been attempted to " be set aside on the ground of the admission of an incompetent " witness or the rejection of a competent one. The court has " invariably met those applications by saying: " ' You have con- " ' stituted your own tribunal; you are bound by its decision.' " The only exceptions to that rule are cases where the award is " the result of corruption or fraud, and one other, which, though

[3] 3 C.B.(N.S.) 189, 202.

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" it is to be regretted, is now, I think, firmly established, viz., " where the question of law necessarily arises on the face of the " award, or upon some paper accompanying and forming part " of the award. Though the propriety of this latter may very " well be doubted, I think it may be considered as established."

In those circumstances I feel that if Parliament had intended the county court to exercise a jurisdiction on wider principles than those exercised in the High Court, express words would have been necessary to confer that extended jurisdiction, and I cannot think that the words " if he thinks fit " are sufficient to attain that end. Indeed, I think that some help is to be gained from a consideration of the case of *Brown* v. *Dean*.[4] In the County Courts Act of 1888, and in the County Courts Act of 1846, there was a provision that a county court judge could order a new trial, and the words in the Act of 1888 were " if he shall " think just." The words in 1846 were " if he shall think fit." In *Brown* v. *Dean* the county court judge had granted a new trial on the basis of new evidence which it was said had come to light since the trial. The Divisional Court reversed his decision, the Court of Appeal upheld the Divisional Court, and the matter came before the House of Lords. The argument proceeded thus[5]: " The County Courts Act, 1888, gives a full and absolute " discretion to order a new trial ' in every case,' but of course " the discretion must be judicial. The judge must think it just " that there should be a new trial. That is the only condition. " There is no warrant for adding the words that the rules of the " High Court apply to county courts." Lord Loreburn, after stating the principles upon which the High Court would act in such a case, referred first to the judgment in the Court of Appeal by Farwell L.J. He said[6]: " I agree with the judgment of " Farwell L.J., in which he says, referring to the earlier authori- " ties, ' In the present case the county court judge has dis- " ' regarded those principles, and has granted a new trial on affi- " ' davits which shew at the outside that there will be oath " ' against oath on a new trial—and that is clearly not enough— " ' which shew nothing in the nature of surprise, fraud, or con- " ' spiracy, and which also state nothing to show that the infor- " ' mation alleged could not with reasonable diligence have been " ' obtained at the first trial. The real ground that influenced " ' the learned judge appears to have been that he came to his " ' former conclusion of fact with hesitation, and that the matter " ' is serious for the defendant in consequence of his position. " ' Neither of these grounds is in my opinion sufficient.' " Later Lord Loreburn said[7]: " But it is said we have no jurisdiction " upon the ground that under the County Courts Act a county " court judge is entitled to grant a new trial ' if he shall think " ' just.' Those words do not give him an arbitrary discretion. " ' If he shall think just ' means if he shall think just according

[4] [1910] A.C. 373.
[5] Ibid. 374.
[6] Ibid. 375.
[7] Ibid.

" to law. The rules to which I have referred are the law which " he, like other judges, is bound to obey."

Finally, under this head one asks oneself the question: if there is a wider discretion conferred by this subsection, what are the limits to it? Once one gets away from the principles upon which the High Court will act, where is the limit? Can it be said that a county court judge (and if there are no limits to the discretion it could be said) has power to receive evidence on affidavit as to what took place in the arbitration, not to show misconduct on the part of the arbitrator—that could always be done —but to show what was not patent on the face of the award, namely, that he had erred in law? It seems to me that if one was to treat the discretion at its widest in that sense, it would be in a sense revolutionary, certainly revolutionary in 1846.

For those reasons I am satisfied that the county court judge in exercising his discretion under subsection (3) of section 89 must follow the same principles as those upon which the High Court acts in regard to setting aside awards. Accordingly, it becomes unnecessary to consider Mr. Davies' second contention, which is the alternative one, that even if there were this wide discretion, it was wrongly exercised.

I would like to add this. As I have already said, it would appear that the county court judge under this subsection has no power to remit; he certainly is not given express power to remit, and, as I have already said, it is probable that until 1854 the High Court possessed no inherent power, either generally or as ancillary to a power to set aside, to remit. Indeed, the industry of counsel in this case has failed to find any such case. That power was, as I have said, first given to the court in the Common Law Procedure Act of 1854, and is now to be found in section 22 of the Arbitration Act of 1950, but the reference to " court " in the Arbitration Act of 1950 is a reference to the High Court only unless the context otherwise requires, and while the reference to " any court " in section 4 of the Act dealing with the stay of proceedings has been held to include the county court, I do not see how it is legitimate to construe " court " in section 22 as otherwise than the High Court itself. I cannot help thinking that it is an unfortunate omission in subsection (3) of section 89 that there is no express power to remit. I think the present case shows this up very clearly in that I cannot help thinking that if the power had existed, the judge would have welcomed the exercise of it and remitted this case to the arbitrator. It may be that it would be possible to obtain, as it were, a power to remit by making it a condition of the terms of reference under subsection (3) of section 89, but in one way or another I think that a power to remit is really essential for the proper working of this section.

For the reasons I have endeavoured to state, I would allow this appeal.

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PEARCE L.J. I agree with all that my Lord has said.

JENKINS L.J. I entirely agree, and although we are differing from the judge, I cannot usefully add anything to the reasons given by Parker L.J.

Appeal allowed.

Solicitors: *Franks, Charlesly & Leighton; Herbert Oppenheimer, Nathan & Vandyk.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

1958
July 29, 30;
August 20.

Lord Goddard C.J., Donovan and Ashworth JJ.

SMITH AND OTHERS *v.* WYLES.

Gaming—Lottery—Licensed premises—Bowling club conducting small lottery in public house—Whether "gaming"—If so, whether such gaming on licensed premises protected by Acts of 1934 *and* 1956—*Betting and Lotteries Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *ss.* 21, 22—*Licensing Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 141—*Small Lotteries and Gaming Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 45), *ss.* 1, 4, 5 (1).

The licensee of a public house was also the president of a bowling club, which had its headquarters at the public house. The club, which was registered under the Small Lotteries and Gaming Act, 1956,[1] promoted a lottery in aid of its funds. Sales of tickets for

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[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Betting and Lotteries Act, 1934, s. 21: "Subject to the provisions of "this Part of this Act, all lotteries "are unlawful."

S. 22: "(1) Subject to the provi- "sions of this section, every person "who in connexion with any lottery "promoted or proposed to be pro- "moted either in Great Britain or "elsewhere— . . . (*f*) uses any pre- "mises, or causes or knowingly "permits any premises to be used, for "purposes connected with the promo- "tion or conduct of the lottery . . . "shall be guilty of an offence. (2) In "any proceedings instituted under the "preceding subsection it shall be a "defence to prove that the lottery to "which the proceedings relate was "such a lottery as is declared by any "subsequent section of this Part of "this Act not to be an unlawful "lottery, and that at the date of the "alleged offence the defendant be- "lieved, and had reasonable ground "for believing, that none of the "conditions required by that section "to be observed in connexion with the "promotion and conduct of the lottery "had been broken."

Licensing Act, 1953, s. 141: "(1) "If the holder of a justices' licence "suffers any gaming or unlawful "game to be carried on in his pre- "mises he shall be liable, on a first "conviction to a fine not exceeding "ten pounds, and on a subsequent "conviction to a fine not exceeding "twenty pounds."

Small Lotteries and Gaming Act, 1956, s. 1: "(1) This section applies "to any lottery . . . which is pro- "moted in Great Britain on behalf of "a society registered by the local "authority under this Act, being a "society established and conducted "wholly or mainly for one or more "of the following purposes, that is to "say—(*a*) charitable purposes; (*b*) "participation in or support of athletic "sports or games or cultural activi- "ties; (*c*) purposes not described in "the foregoing paragraphs, and not "being purposes of private gain or "purposes of any commercial under- "taking, and is so promoted for "raising money to be applied for "purposes of the society. (2) A "lottery to which this section applies "shall be deemed not to be an

the lottery were made in the bar of the public house, and two draws took place in the smoke room. The licensee knew and approved of the sales and the draws, which were made by releasing from a canister containing table tennis balls, two numbered balls. The holder of the ticket which had the two numbers corresponding with the tennis balls won a prize. The licensee was convicted under section 141 of the Licensing Act, 1953, of suffering gaming to take place on licensed premises, and the two officers of the club, who had sold the tickets for the draws, were convicted of aiding and abetting the commission of the offences:—

Held, (1) that the drawing of the lottery was gaming, and that continuous participation by the players was not an essential ingredient of gaming.

(2) That even though the lottery was a lawful one under the Small Lotteries and Gaming Act, 1956, the prohibition against gaming on licensed premises contained in section 141 of the Licensing Act, 1953, was paramount and was not affected by the Act of 1956, and the licensee was rightly convicted.

CASE STATED by Birmingham stipendiary magistrate.

The following facts are taken from the judgment of Ashworth J.: By an information preferred by the prosecutor, Alfred Phillip Wyles, Albert Edward Smith, the licensee of the Deer's Leap public house, Kingstanding, Birmingham, was charged with two offences of suffering gaming to take place on licensed premises, contrary to section 141 of the Licensing Act, 1953. Walter Thomas Barnes and Arthur Bishop were charged with aiding and abetting the commission of those offences.

The stipendiary magistrate found the following facts: The licensee was at all material times the president of the Deer's Leap Bowling Club; Barnes and Bishop were its vice-president and secretary respectively. The headquarters of the club were situate at the Deer's Leap public house. In October, 1957, the club was duly registered under the provisions of the Small Lotteries and Gaming Act, 1956, for the purpose of promoting a lottery in accordance with that Act. The three officers of the club were all men of excellent character and repute.

On November 22, 23 and 24, 1957, Barnes and Bishop sold a number of sixpenny tickets for a lottery promoted by the club;

"unlawful lottery but the following "conditions shall be observed in "connexion with the promotion and "conduct of the lottery. . . ."

S. 4: "(1) This section applies to "any entertainment promoted in "Great Britain for raising money to "be applied for purposes other than "purposes of private gain, being an "entertainment at which games of "chance or of chance and skill com- "bined are played in accordance with "the following conditions . . . "(6) Nothing in this section shall be "construed as affecting the operation "of any of the following enactments, "that is to say—(*a*) section one "hundred and forty-one of the "Licensing Act, 1953 (which penalises "the holder of a justices' licence who "allows gaming or unlawful games "in his premises) . . ."

S. 5: "(1) The Betting and Lot- "teries Act, 1934, shall have effect as "if sections one and four of this Act "were included in Part II of that "Act, and were so included after "section twenty-two of that Act "(which provides a defence in pro- "ceedings under that section in "respect of lotteries regulated by any "subsequent section of the said "Part II)."

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these sales took place in the bar of the Deer's Leap public house and the licensee saw and approved such sales. On the evening of November 24, 1957, a draw took place under the supervision of Barnes in the smoke room of the Deer's Leap, the method adopted involving the use of a canister containing table tennis balls and the release therefrom of two numbered table tennis balls. The holder of the lottery ticket, who had selected upon purchase the combination of two numbers which corresponded with those upon the two balls released from the canister, was entitled to a prize.

On November 30, 1957, Barnes and Bishop again sold tickets for a lottery promoted by the club and a draw was made on December 1, 1957, in the above-mentioned manner. The licensee knew and approved of the draw taking place. Each of the two lotteries was conducted by Barnes and Bishop on behalf of the club and in aid of the club funds.

It was contended for the licensee that on the facts the events which took place at the Deer's Leap public house could not properly be regarded as gaming; or alternatively, that even if the holding of the lottery did amount to gaming, the combined effect of the Betting and Lotteries Act, 1934, and the Act of 1956 was impliedly to repeal section 141 of the Licensing Act, 1953, by rendering such gaming when it occurs on licensed premises lawful.

It was contended for the prosecutor, that the drawing of the lottery at the Deer's Leap public house was gaming, and that section 141 of the Licensing Act, 1953, had not been affected by the Act of 1956 or the combined effect of the Acts of 1934 and 1956.

The magistrate was of the opinion that what took place in this case, whether it was called a lottery or a sweepstake or was regarded as more analogous to such a game as roulette, where the player selects the number he wishes to back, was undoubtedly gaming.

The licensee was accordingly convicted of suffering gaming on licensed premises contrary to section 141 of the Licensing Act, 1953, and Barnes and Bishop were convicted of aiding and abetting the same.

They appealed by way of case stated.

Sir Frank Soskice Q.C. and *Stephen Brown* for the appellants.

B. S. Wingate-Saul for the prosecutor.

The following cases were cited in argument, in addition to the cases referred to in the judgments: *Ankers* v. *Bartlett* [2]; *Daniels* v. *Pinks* [3]; *Davies* v. *Parker* [4]; *Fielding* v. *Turner* [5]; *Reg.* v. *Ashton* [6]; *Bew* v. *Harston* [7]; *Dyson* v. *Mason* [8]; *Lockwood* v.

[2] [1936] 1 K.B. 147.
[3] [1931] 1 K.B. 374; 47 T.L.R. 166.
[4] [1931] 2 K.B. 210; 47 T.L.R. 418.
[5] [1903] 1 K.B. 867; 19 T.L.R. 404.
[6] (1852) 1 E. & B. 286.
[7] (1878) 3 Q.B.D. 454.
[8] (1889) 22 Q.B.D. 351; 5 T.L.R. 231.

Cooper[9]; *Hardwick* v. *Lane*[10]; *Welton* v. *Ruffles*[11]; *Keep* v. *Stevens*.[12]

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Cur. adv. vult.

LORD GODDARD C.J. Ashworth J. will deliver the first judgment.

ASHWORTH J. read the following judgment in which he stated the facts and continued: The first of the submissions made on behalf of the appellants involves the problem of what is meant by gaming. There appears to be no statutory definition of the word, and although there are many reported cases in which the meaning of the word has been considered, I am not for my part satisfied that there is to be found in any of them a definition which can be applied generally. For the appellants, Sir Frank Soskice contended that gaming involves something in the nature of a game in which the players not only participate but participate continuously: accordingly, it was submitted that a person who buys a lottery ticket on a given day when the draw is not due to take place until one or more days have elapsed and the purchaser of the ticket may well be absent, is not gaming. In my judgment, this contention places too restricted a meaning upon the word "gaming." Undoubtedly some games involve gaming but it does not follow that gaming involves a game. Moreover, I do not think that the time factor enters into the problem in the way suggested on behalf of the appellants.

It was conceded that persons who play roulette are gaming; they are staking their money in a proceeding the outcome of which is dependent merely upon chance. Like the stipendiary magistrate, I take the view that there is no difference in principle between that form of proceeding and the one involved in the present case, where the stake is represented by a ticket and the outcome is dependent on two numbered balls released from a canister, and not one ball spun on a roulette board.

It is true that in places the relevant statutes appear to draw a distinction between lotteries and gaming: for example, in section 24 (1) (*a*) of the Act of 1934 reference is made to "purposes not connected with gaming, wagering or lotteries." Moreover, in the Act of 1956, lotteries and gaming parties are treated separately. But in my view these provisions do not justify the inference that lotteries and gaming are, so to speak, mutually exclusive terms. The truth is that some lotteries involve gaming and some do not, just as some gaming involves a lottery and some does not. The facts of each case relating to a lottery require separate consideration in order to determine whether that lottery constitutes gaming or not.

In the course of the argument reference was made to *Morris*

[9] (1903) 72 L.J.K.B. 690.
[10] [1904] 1 K.B. 204; 20 T.L.R. 87.
[11] [1920] 1 K.B. 226.
[12] (1909) 100 L.T. 491.

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v. *Baguley*,[1] a decision of this court given in the year 1937, in which the problem now under consideration was raised. There is no properly authenticated report of the decision but it is mentioned in the Brewing Trade Review law reports for that year. The original case stated was obtained from the Crown Office and from that document it was clear that the question raised for the consideration of this court was whether the drawing of a sweepstake constituted gaming. The drawing took place on licensed premises and the licensee was charged with having suffered gaming to be carried on upon his licensed premises contrary to section 79 of the Licensing (Consolidation) Act, 1910. The justices held that gaming had not taken place and the informant appealed. It was held by this court that gaming had in fact been suffered on licensed premises. It is only right to add that the respondent licensee was not represented at the hearing of the appeal.

On the question therefore whether the drawing of a sweepstake or lottery constitutes gaming, that case appears to be a decision directly in favour of the present respondent, and Sir Frank Soskice sought to avoid its consequences by contending that it was not binding on this court for one of the reasons given in *Young* v. *Bristol Aeroplane Co. Ltd.*,[2] and applied in *Police Authority for Huddersfield* v. *Watson*,[3] namely, that it was given per incuriam. I can see no reason why the decision in *Morris* v. *Baguley*[4] should be so regarded, and, quite apart from any views of my own, I should feel bound by it. But as already indicated, I have come to the same conclusion independently, and in my view the first submission of the appellants fails.

The second submission involves consideration of the relevant statutory provisions. It is convenient to start with the Act of 1934. Section 21 provides that subject to the provisions of Part II of the Act all lotteries are unlawful. Section 22 (1) contains a list of offences in connexion with lotteries of which paragraph (*f*) is of particular relevance—"uses any premises or causes or knowingly "permits any premises to be used, for purposes connected with "the promotion or conduct of the lottery." Section 22 (2) provides that in any proceedings instituted under the preceding subsection it shall be a defence to prove that the lottery was such a lottery as is declared by any subsequent section of Part II not to be an unlawful lottery. Sections 23 and 24 each contain provisions whereby lotteries falling within their limited scope are deemed not to be unlawful lotteries. I shall refer to such lotteries as exempted lotteries.

It may be noted that the Act of 1934 contained no specific provision relating to licensed premises. Accordingly, a licensee on whose premises a lottery was conducted might be charged with a contravention of section 22 (1) (*f*), unless the lottery was

[1] [1937] Brewing Trade Review L.R. 73.

[2] [1944] 1 K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293.

[3] [1947] 1 K.B. 847; 63 T.L.R. 415; [1947] 2 All E.R. 193.

[4] [1937] Brewing Trade Review L.R. 73.

an exempted lottery. Further, if the lottery involved gaming and was conducted on his premises, he might also be charged with a contravention of the Licensing (Consolidation) Act, 1910, as was in fact done in *Morris* v. *Baguley*.[4]

The next relevant Act is the Licensing Act, 1953, but in my view there is no material difference between section 141 of that Act and section 79 of the Act of 1910, and I need not refer to the terms of either section in detail.

The Act of 1956 is, however, of great importance. By virtue of section 1 certain small lotteries conducted for charitable, sporting or other purposes are deemed not to be unlawful lotteries, providing certain conditions are observed. Section 4 deals with a limited class of entertainments, at which games of chance or of chance and skill combined are played, and by subsection (2) provides that places where such entertainments are held, shall not be deemed to be common gaming houses. Subsection (3) provides that a game played at an entertainment to which the section applies in accordance with the prescribed conditions shall not be deemed to be an unlawful lottery.

If one analyses the position at this stage, the result is that there have been two additions to the pair of exempted lotteries mentioned in sections 23 and 24 of the Act of 1934. These additions are a small lottery falling within section 1 of the Act of 1956 and a game played at an entertainment falling within section 4. But a person who used premises or permitted premises to be used for either of these additional lotteries would still have been liable to prosecution for an offence under section 22 (1) (*f*) of the Act of 1934, as the defence provided by section 22 (2) is only applicable in the case of lotteries declared not to be unlawful by any subsequent section in Part II of that Act. In order to meet this situation the draftsman provided a somewhat oblique remedy by including in section 5 of the Act of 1956 a provision that the Act of 1934 should have effect as if sections 1 and 4 of the Act of 1956 were included in Part II of the Act of 1934. The defence provided by section 22 (2) of the Act of 1934 is therefore available in the case of the additional exempted lotteries.

It is now necessary to consider the effect of subsection 6 of section 4 of the Act of 1956 which provides: "Nothing in this "section shall be construed as affecting the operation of any of "the following enactments, that is to say:—(*a*) section 141 of "the Licensing Act, 1953." The inclusion of this provision in this section and the omission of any corresponding provision in section 1 of the Act of 1956 are the points upon which I have felt most doubt. If it was the intention of the legislature to maintain the full force and effect of section 141 in relation to exempted lotteries and to dispel any doubts as to its applicability, one might have supposed that the Act of 1956 would contain a separate section: "Nothing in this Act shall be construed as

[4] [1937] Brewing Trade Review L.R. 73.

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"affecting the operation of section 141." Furthermore, the explanation that subsection 6 was included in section 4 ex majore cautela is not very convincing since section 1 would appear to call for the same degree of caution. On the other hand, I find no less difficulty in accepting Sir Frank Soskice's contention that by implication section 141 is rendered inapplicable to lotteries falling within section 1 of the Act of 1956. The omission of any reference to section 141 in section 1 of the Act of 1956 may be said to afford some support for the contention that lotteries within section 1 do not involve gaming and therefore no reference to section 141 was called for, but I have already stated my conclusion that such lotteries may (and in the present case did) involve gaming. For my part I am not prepared to take the further step of deducing, from the omission of any reference to section 141 in section 1 of the Act of 1956, that section 141 ceased to apply to the gaming (if any) involved in a lottery under that section 1.

Although I do not feel confident on the point, I am inclined to think that the draftsman treated lotteries falling within section 1 of the Act of 1956 on the same basis as the lotteries exempted under sections 23 and 24 of the Act of 1934: no special reference to the provisions of the Licensing Act, 1910, had been thought necessary in regard to those exempted lotteries, and therefore none was required in respect of the lotteries exempted under section 1 of the Act of 1956 which are lotteries properly so called. On the other hand, section 4 was introducing something different, namely, the exemption of gaming parties which might or might not be lotteries, and in respect of these a reference to section 141 was thought to be necessary.

Whatever may be the true explanation, I am of opinion that once it is established that gaming is involved, a licensee cannot lawfully suffer it to take place upon his licensed premises. In my judgment, section 141 of the Licensing Act, 1953, was not affected by the Act of 1956, and accordingly this appeal should be dismissed.

Donovan J. has authorised me to say that he agrees with this judgment.

LORD GODDARD C.J. I agree that this appeal fails. I have come to this conclusion by a shorter route as in my opinion the only question that falls for decision is whether the conduct of a lottery is a form of gaming. If it is, in my opinion it cannot be conducted on licensed premises although it is one which otherwise would be exempted from penalties. The legislature has always been at pains to prohibit public houses being used for the purpose of gambling whether by betting or gaming, and in my opinion section 4 (6) of the Act of 1956 is intended to maintain this absolute prohibition, notwithstanding that a particular form of gaming for particular purposes is exempted from penalties if conducted elsewhere. Apart from authority, I think that

participating in a lottery is gaming and I agree with the magistrate that it is analogous to a game of roulette. In the one case the player buys a numbered ticket which if drawn gains a prize, in the other he chooses a number on a board and if the ball stops at that number he wins. If the latter is gaming, and no one could argue the contrary, I cannot see why the former is not. Moreover, the decision in *Morris* v. *Baguley* [5] is directly in point; the short report, to which our attention was called, does not appear to have been reported by a member of the Bar and, apparently, it was only argued on one side. But we sent for the special case, from which it is clear that the only question submitted was whether the drawing of a lottery was gaming, and this court held that it was. Even if I did not agree with the decision, I should feel I was bound by it. That case was decided after the Act of 1934 had been passed, and in my opinion is conclusive, as indeed I understood Sir Frank Soskice to agree that it was, if we were of opinion that it was binding on us. I agree that the lottery with which this case is concerned falls within the exemptions conferred by the Act of 1956, but the prohibition of gaming on licensed premises still remains, so to gain immunity it must be conducted elsewhere. It is true that the Act deals with both lotteries and gaming, but that I think is because lotteries are only one form of gaming, carried out by the drawing of a numbered ticket, and of which a sweepstake is a common example; had Parliament intended to make so startling a departure from its previous policy as to allow lotteries of any description in public houses while still prohibiting other gaming, I should have expected some very clear words to effect such a change.

Before parting with this case I should like to say, as I have said on other occasions, that I think it is unfortunate that decisions of this court on matters relating to criminal law can never be the subject of appeal. I feel no doubt as to the correctness of the decision in *Morris* v. *Baguley*,[5] but supposing we had felt that it was wrong or at least open to question, we should none the less be bound by it. It does happen from time to time that this court has to follow a decision with which they find it difficult to agree, and if their decision were open to appeal both the instant case and that which it followed could be reviewed. I continue to hope that the time will come when by leave and subject perhaps to terms as to costs it will be possible to take either to the Court of Appeal or perhaps direct to the House of Lords a decision of this court, although it relates to a criminal cause or matter. The complexity of modern legislation I feel sure makes this desirable.

Appeals dismissed.

Solicitors: *Field, Roscoe & Co. for Colin Langley & Smith, Birmingham; Sharpe, Pritchard & Co. for M. P. Pugh, Birmingham.*

[5] [1937] Brewing Trade Review L.R. 73.

[PRIVY COUNCIL.]

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MAORI TRUSTEE . . . . . Appellant;

AND

MINISTRY OF WORKS . . . . . Respondent.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Compulsory Purchase — Compensation — Potentiality for building development—Principles applicable—Maori land—(New Zealand) Finance Act (No. 3), 1944, s. 29 (1) (b)—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), s. 2. New Zealand.

On September 15, 1952 (the specified date) the Crown, under the Public Works Act, 1928, of New Zealand, compulsorily acquired 91 acres of Maori land, part of an area of 242 acres in respect of which there was at the date of taking no more than a paper plan of a proposed subdivision into lots, and if the approval of the plan had been received from the appropriate Minister and the subdivision had in fact been carried out by the provision of roads, drainage and other facilities, some of the lots could have been sold immediately for residential or industrial purposes and the balance sold in lots from time to time over a period of years. On the specified date, however, there were in fact no subdivided lots, no roads or drainage, etc.—the land had still to be developed for subsequent occupation as building land:—

Held, that the Maori Land Court, in assessing compensation for the land taken, must value it in its state at the time of taking, and under section 29 (1) (*b*) of the Finance Act (No. 3), 1944, of New Zealand, that value was to be assessed at "the amount which the "land if sold in the open market by a willing seller on the specified "date might be expected to realize." The land must be valued for what it in fact was on the specified date—a tract of land capable of subdivision into building allotments and being sold subsequently in that form, but there must be excluded from the court's contemplation retention by the claimant, and an assessment of what in his hands it would yield if subdivided. To give a claimant compensation on the basis that there were subdivisions of the land, when, in fact, there were not, would be to give him compensation for unrealized possibilities as if they were realized possibilities.

St. John's College Trust Board v. *Auckland Education Board* [1945] N.Z.L.R. 507 held wrongly decided.

Turner v. *Minister of Public Instruction* (1956) 95 C.L.R. 245 considered.

The court must contemplate the sale of the land as a whole unless it appeared that the necessary legal consents to a subdivisional plan had been given, and a survey on the ground at the specified date would have disclosed that the land or some part of it was in fact so far subdivided that the subdivided parts could at that date have been immediately sold and title given to individual purchasers, in which case the parts so subdivided might be separately valued for the purpose of arriving at the total amount of compensation.

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* *Present*: Viscount Simonds, Lord Morton of Henryton, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning.

If the land had to be valued as a whole, the court, in assessing the potentialities, might take into account the suitability of the land for subdivision, the prospective yield from a subdivision, the costs of effecting such a subdivision, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies and profit for himself.

Order of the Court of Appeal of New Zealand varied.

APPEAL (No. 12 of 1958) from an order of the Court of Appeal of New Zealand (December 19, 1956).

The following facts are taken from the judgment of the Judicial Committee: This was an appeal from the judgment of the Court of Appeal of New Zealand on a case stated by the Maori Land Court relating to the basis of compensation to be awarded in respect of land taken compulsorily by the Crown under the Public Works Act, 1928.

It will be convenient to set out chronologically certain relevant dates and events. In 1948 a plan was prepared for the subdivision of certain Maori land of some 242 acres in extent in the neighbourhood of the harbour at Tauranga. This plan required the approval of the Minister of Works. Any sale of plots of less than 10 acres within the area, before this consent was obtained, was illegal.

Later in 1948 an application was made to the Maori Land Court for an order vesting the 242 acres in a trustee. The object was to facilitate transfers of land within the area by avoiding the need for a multiplicity of signatures. By order dated July 15, 1948, the Maori Land Court vested the land in the Waiariki District Maori Land Board (hereafter referred to as the Maori Land Board) as trustee. This order did not become operative until approved by the Minister for Maori Affairs.

On September 13, 1951, the Minister of Works gave notice of intention to take about 91 acres of the 242 acres. In November, 1951, the Minister of Maori Affairs notified his approval of the order vesting the 242 acres in the Maori Land Board. On September 11, 1952, there was gazetted a Proclamation taking the 91 acres and vesting that area in the Minister of Works as from September 15, 1952 (hereafter called the specified date).

On September 29, 1952, the Maori Land Board claimed as compensation for the taking of the 91 acres the sum of £109,011, of which £95,711 was for the value of the land and the balance for injurious affection of other land. On September 30, 1952, under the Maori Land Amendment Act, 1952, the Maori Trustee (the present appellant) came in place of the Maori Land Board.

On April 6, 1954, an application by the Minister of Works for ascertainment of compensation for the land taken came before the Maori Land Court. On July 11, 1955, the Maori Land Court stated a case for the opinion of the Supreme Court of New Zealand which of consent was removed into the Court of Appeal who, on December 19, 1956, gave the judgment which now came before their Lordships' Board.

The relevant provision which governed the assessment of

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compensation was section 29 (1) (*b*) of the Finance Act (No. 3), 1944, which was in the following terms: "The value of land shall, "subject as hereinafter provided, be taken to be the amount "which the land if sold in the open market by a willing seller on "the specified date might be expected to realize."

The case stated, after pointing out that it would have been useless for the Maori Land Board to have proceeded with the subdivision after the issue of the notice of intention to take the land, continued:

"No evidence was adduced to show when the subdivision "would have been proceeded with if the Minister's approval had "been granted at an earlier date. The evidence adduced did show "that the carrying out of a subdivision would have involved a "considerable outlay for roading, drainage and other development, "and other costs of subdivision.

"Upon hearing the evidence and submissions of counsel the "court has found that part of the land would have been imme-"diately saleable at the date of the taking in lots upon a "subdivision either for residential or industrial purposes, and that "the balance would have been saleable in lots upon a subdivision "for residential or industrial purposes from time to time over a "period of years subsequent to the date of taking.

"A question of law arises as to the basis upon which the "value of the land should be assessed, including the question as "to whether there should be any difference in the method of "assessment of the value of, first that part of the land which "would have been immediately saleable in lots at the date of the "taking, and secondly that part which would have been saleable "in lots from time to time over a period subsequent to the date "of the taking.

"The questions which are stated for the opinion of this "honourable court are:

"(1) Is the value of the land to be assessed upon the assump-"tion that the claimant sold the land at the date of the taking "in one undivided parcel to one purchaser desirous of acquiring "it for the purpose of subdivision and sale in lots?

"(2) Is the value of the land to be assessed upon the assump-"tion that the claimant sold at the date of the taking that part of "the land which was then immediately saleable in lots to several "purchasers in lots according to a subdivision made by him and "sold the balance of the land to several purchasers in lots from "time to time over a period subsequent to the date of the taking "according to a subdivision made by him?"

Certain further questions had been submitted on the assumption that those two questions were answered in the negative, but it was unnecessary to refer to those for the purposes of this appeal. The Court of Appeal (Gresson, Adams and Shorland JJ.) did not answer the questions stated specifically but expressed their opinion in the following order:

"(1) In accordance with section 29 (1) (*b*) of the Finance Act

" (No. 3), 1944, and subject to the other provisions of that section " the function of the Maori Land Court is to ascertain as the " value of the land ' the amount which the land if sold in the " ' open market by a willing seller on the specified date might be " ' expected to realize.' The specified date is September 15, 1952.

" (2) The valuation must be of the land in the state in which " it is on the specified date; any potentialities shall be taken into " account in assessing its value.

" (3) The court must contemplate the sale of the land as a " whole unless on the specified date there could have been " separate sales of particular portions, and there was a market for " such separate portions. Only if the land had been legally sub- " divided at that date so that particular lots might have been sold " and title given can it be said that there could have been " separate sales of particular portions.

" (4) If the land has to be valued as a whole, the court in " assessing the potentialities may take into account the suitability " of the land for subdivision, the prospective yield from a sub- " division, the costs of effecting such a subdivision, and the " likelihood that a purchaser acquiring the land with that object " would allow some margin for unforeseen costs, contingencies " and profit for himself."

1958. July 7, 8, 9, 10. *E. D. Blundell* and *Patrick O'Connor* for appellant.

H. R. C. Wild Q.C., S.-G. of New Zealand, and *J. D. F. Moylan* for the respondent.

In addition to the cases referred to in the judgment the following were cited in argument: *Thomas* v. *Valuer-General* [1]; *Commonwealth of Australia* v. *Arklay* [2]; *Minister for Public Works* v. *Thistlethwayte* [3]; *Inland Revenue Commissioners* v. *Clay* [4]; *Marshall* v. *Minister of Works* [5]; *Spencer* v. *Commonwealth of Australia* [6]; *Grace Brothers Pty. Ltd.* v. *The Commonwealth* [7]; *Horn* v. *Sunderland Corporation* [8]; *In re Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd. and Pontypridd Waterworks Co.* [9]; *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* [10] and *Fraser* v. *City of Fraserville.* [11]

October 2. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM, who stated the facts set out above and continued: Their Lordships construe the findings in fact in the case stated, as narrated above, as meaning that there was at the

[1] (1918) 37 N.Z.L.R. 164.
[2] (1952) 87 C.L.R.(Aus.) 159.
[3] [1954] A.C. 475; [1954] 3 W.L.R. 305; [1954] 2 All E.R. 843.
[4] [1914] 3 K.B. 466; 30 T.L.R. 573.
[5] [1950] N.Z.L.R. 339.
[6] (1907) 5 C.L.R.(Aus.) 418.
[7] (1946) 72 C.L.R.(Aus.) 269.
[8] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480.
[9] [1902] 2 K.B. 135; 18 T.L.R. 604.
[10] [1914] A.C. 569; 30 T.L.R. 293.
[11] [1917] A.C. 187; 33 T.L.R. 179.

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date of the taking no more than a paper plan of a proposed subdivision, and that if the approval of this plan had been received from the appropriate Minister and the subdivision had been in fact carried out by the provision of the necessary roads, drainage, and other facilities, some of these lots could have been sold immediately for residential or industrial purposes and the balance sold in lots from time to time over a period of years subsequent to the taking. This their Lordships take to correspond to the view expressed somewhat more shortly by Shorland J. where he says: "The words 'upon a subdivision' are taken from the case "stated, but they require some amplification. I construe the "words 'upon a subdivision' as meaning upon a subdivisional "scheme having received the approval of the appropriate Minister "of the Crown, and having been completed to the stage at which "the owner could in fact and in law sell the subdivided allot-"ments to separate purchasers."

Their Lordships are not clear what is involved in the content of the second question of law submitted by the Maori Land Court. If it refers to lots in fact subdivided by the owner at the date of the taking, there were no such lots. If it refers to a notional subdivision by the owner in accordance with the development plan their Lordships are of opinion for the reasons to be given that no valuation upon such a hypothetical sale in subdivision can be entertained. It is probably because of the difficulties underlying this second question of law that the Court of Appeal thought proper to give their decision in the form in which they did.

It is fundamental that the land must be valued in its state at the time of the taking. Under the Act of 1944 that value is to be assessed at the amount which a willing seller might be expected to realize if the land were sold in the open market at the date of the taking. This is not necessarily the price which it would fetch because the costs of realization will have to be taken into account. Section 29 corresponds to section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, in the United Kingdom, which did away with the extravagant claims and extravagant awards that were frequently made under the Lands Clauses Acts and similar legislation on the view that the owner was an unwilling seller. What in effect is being computed is the capital value of an asset, and while in the case of land it may not always be as easy to calculate this as it would be in the case of ascertaining the market price of easily realizable stocks or shares or commodities in the field of commerce, the problem does not generally present any great difficulty in the hands of competent land valuers. There are, however, as has frequently been observed, cases where land has a potentiality which may be realizable in the foreseeable future and, if so, will give the land an added value over and above its value for the uses made of it at the time of the taking. As the case of *Vyricherla Narayana*

Gajapatiraju v. *Revenue Divisional Officer, Vizagapatam* [1] shows, the task of valuing land with such a potentiality may not always be an easy one. And in such cases it is difficult to envisage a sale to more than one hypothetical purchaser who is prepared to buy the land with a view to developing and realizing the benefit of this potentiality. There seems no reason, however, why this need be in all cases an inevitable assumption. If the area of land taken, for instance, is so large as to be capable of building development in the hands of separate purchasers operating in different sections of the total area, more than one hypothetical purchaser could be imagined. But for purposes of valuation the result would seem to be immaterial. The value of the whole in the open market for building development would seem to be equivalent to the sum of the values of the various parts if sold separately for the same purpose. The costs to the seller might be slightly greater in the one case than in the other, and this might lead to the assumption of a slightly higher market price in cumulo in the case of a sale to a number of purchasers. But as the costs of realization would be a factor to be taken into account in calculating the amount realized by the owner, the results at the end of the day should be very much the same. A similar situation might exist if there had to be assumed a sale of six houses by a willing owner-seller in the open market. He could hardly be expected to sell them in a single lot to one purchaser for less than he could realize by selling them separately to six purchasers. The purpose of the transactions in the illustrations given would, of course, be different, for in the case of land of which the value has been fully realized in the hands of the owner its sale would be for the personal use of the purchaser or as an investment having profit-bearing qualities and possibilities of capital appreciation, whereas in the case of land with a development potentiality the value of the land has not yet been fully realized, and the land may be bought with the view, by further capital outlay, of realizing this potentiality. This necessarily leads to very different considerations in arriving at an estimate of market price.

In the case of the land in question here there are, in their Lordships' view, three material factors which the compensation tribunal must have in view. First, the consent of the Maori Minister had to be given to any sale of the land in question by the Maori Trustee under section 8 (9) (*a*) of the Native Purposes Act, 1943. Secondly, the plan could not be carried into execution without the consent of the Minister of Lands or delegated authority as required by the Land Sub-division in Counties Act, 1946. Their Lordships find it unnecessary to go through the provisions of this Act, but it contains an absolute prohibition of the sale of any allotment of less than 10 acres in any subdivision or the formation of any proposed road in connexion

[1] [1939] A.C. 302; 55 T.L.R. 563.

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therewith unless the scheme plan has been previously approved by the Minister or delegated authority. It is clear that as a scheme of land development the plan, if it had ever got to the stage of consideration by the Minister, might have been very materially modified in the matter of roads, drainage, accesses, the establishment of reserves, co-ordination with adjacent areas and other respects, if it were not entirely scrapped and had to be written anew. Thirdly, there were in fact no subdivided lots as shown on the plan, no roads, fences, accesses, drainage or other facilities. The land was still land that had to be developed for subsequent occupation as building land.

In the case of the first of these factors it may be easy for the compensation tribunal to assume that the consent of the Maori Minister would have been given as this was a scheme, as their Lordships were given to understand, for the benefit of the Maoris. The second factor raises very different considerations. The question whether, but for the notice to take and the subsequent taking by Proclamation, the Minister would have approved of the proposed scheme clearly involves problems for the compensation tribunal on which their Lordships can only speculate and are unable to enter. It may be that all that can be affirmed is that at the date of the taking the land was ripe for building development to a greater or less extent under some scheme or another which would be likely to obtain ministerial approval. In short, the compensation court would have to consider the likelihood of the proposed scheme being approved by the Minister, or, if not, some alternative scheme, very much as they might have to estimate the probability of some restrictions on sale, temporary or otherwise, being removed, as pointed out by Lord Dunedin in *Corrie* v. *MacDermott*.[2] This all leads up to the third consideration mentioned, that there were at the date of the taking no subdivisions in fact. The task of the compensation court, as their Lordships see it, is to estimate how far the land was ripe at the date of the taking for subdivisional development and how soon, looking to the need of obtaining any necessary consents, the land would in fact, but for the taking, have been fully developed, and to value it accordingly.

With one qualification, their Lordships would agree with the following passage in the judgment of Gresson J.: "In my opinion "in this case the land must be valued for what it in fact was on "the specified date—a tract of land capable as to some, perhaps "all of it, of subdivision into building allotments, and of being "sold at some time and over some period in that form. That "circumstance would influence a purchaser in his determination "of price. In estimating what price a purchaser would be willing "to pay recourse may be had to an examination of the estimated "gross yield from a subdivision as yet notional only, and the "estimated deductions that a purchaser would have to take into

[2] [1914] A.C. 1056, 1064.

" account; but that is the extent to which a notional subdivision " can be regarded. There must be excluded from the court's " contemplation retention by the claimant and an assessment of " what in his hands it would yield if subdivided, because that " course is not open to him. At the time value has to be deter- " mined the land was in fact not—legally speaking—subdivided " so as to permit of sale piecemeal. A good deal requires to be " done before there can be disposal in that manner, and as well as " expenses there will be risk and delay."

Their Lordships would accept this as an accurate statement of the position though, in their opinion, the passage would suffer in no way if the words " legally speaking " were omitted. In accepting this statement of opinion their Lordships understand the judge by the words " legally speaking " to be referring to a previous passage in his opinion where he says " it is lawfully open " to award compensation upon the basis of a sale to several " purchasers in lots according to a subdivision but only if in fact " there is such a subdivision as would permit of this course being " adopted at the relevant date." In the present case the land could not in fact be subdivided into lots available for immediate sale without the prior consent of the Minister of Works, and for that reason it may be not inapt to refer to a subdivision either as a lawful subdivision or a subdivision in fact. But the crucial and deciding factor in their Lordships' view is a subdivision in fact which has been lawfully carried out.

In the Court of Appeal all the judges felt difficulty from an earlier decision of the Supreme Court of New Zealand in *St. John's College Trust Board* v. *Auckland Education Board.*[3] Gresson J. and Shorland J. found reasons for distinguishing it and, it would seem, accepted it as a good decision on its special facts. Adams J. thought it was wrongly decided. Their Lordships agree with Adams J. It is unnecessary to examine the facts of that case in detail. As was stated by Myers C.J., who gave the judgment of the court, it was common ground that the land was suitable for subdivision into allotments for building purposes, and that compensation should be awarded on that basis. There was no legal impediment to a subdivision. As appears from the case, both the claimant and the respondent submitted in evidence plans of hypothetical subdivisions of the land taken. It is clear that there was in fact no subdivision of the land and that the land had the potentiality of subdivision. This potentiality was estimated by witnesses as being fully realizable in a relatively short period of time. The contest between the parties was whether the value of the land should be assessed on the assumption that the owner would have made his own subdivision, and would have sought to sell the resultant building sections direct to purchasers, or upon the assumption of a sale by the owner to a

[3] [1945] N.Z.L.R. 507.

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purchaser who, having purchased, subdivided the land into building allotments and marketed them. For present purposes the material part of the court's judgment is in the passage which runs [4]: "If then the claimant is able to show that there was a "market for the subdivisions as on December 15, 1942 [the "relevant date], and that the subdivisions could then have been "sold, it is open to the compensation court to award compensa-"tion upon the assumption that, on that date, the claimant sold "the land to several purchasers in lots accordingly." In their Lordships' view this was an erroneous direction in law for the reason that there were in fact no subdivisions, and that to give the claimant compensation on the basis that there were, would be to give him compensation for unrealized possibilities as if they were realized possibilities.

The High Court of Australia had occasion to consider this very question in *Turner* v. *Minister of Public Instruction* [5] under section 124 of the Public Works Act (N.S.W.), 1912, which, though couched in different language, for present purposes may be regarded as introducing the same considerations as section 29 (1) (*b*) of the New Zealand Act. The land in that case was about five acres in extent, and was suitable for subdivision into 19 residential allotments but had not, in fact, been subdivided. As stated by Dixon C.J., the case raised the precise question that arises here. He said [6]: "In the case of the land in question no steps "had been taken for sub-division. It was necessary to survey "it, to prepare plans for sub-division, to obtain the consent of "the local authority, to make streets or roads and then to place "it upon the market. As the land stood it was incapable of sale "in sub-division and it was necessary to make improvements or "alterations in its physical condition before the sub-divisional "prices could be obtained. In those circumstances it could not "be sold in sub-division at the time of resumption. It was not "therefore possible to ascribe to the owner possession of the "present value of its sub-divisional potentialities on the footing "that all you should do is to estimate what he would gain if he "sub-divided the land at a future date and reduced the result to "its then present value. This means, too, that the conclusion "is clearly right which the learned judges of the Supreme Court "expressed in the passage already quoted from their judgment, "viz.: ' . . . the only sale that could be considered is a sale of "' the land as it was at the date of resumption, that is unsub-"' divided, but having the clear potentiality that it was fit for "' sub-division.' "

The opposed questions in the case were whether the compensation for the resumption of the land was to be determined (1) by reference to a hypothetical sale of the land at a price equivalent to the net amount which the owner might have expected to realize on subdividing it and selling it in subdivision, less only an

[4] [1945] N.Z.L.R. 507, 513.
[5] (1956) 95 C.L.R. (Aus.) 245.
[6] Ibid. 269.

allowance for the risk of realization, or (2) by reference to a hypothetical sale in globo to a purchaser buying with a view to subdividing and selling in subdivision, and prepared to pay for the land no more than such a sum as would return to him out of the transaction an amount representing an appropriate allowance for the risk of the venture and a profit to himself. The majority of the court (Williams J. dissenting) agreed that the first question should be answered in the negative, and while Dixon C.J. did not think that the second question could be answered affirmatively as a matter of law, the rest of the majority members (Fullagar, Kitto and Taylor JJ.) agreed that the Supreme Court of New South Wales, from whom the appeal had come, had correctly answered this question in the affirmative.

At the hearing before their Lordships' Board in the present case appellant's counsel were faced with the difficulty that, on their submission, the land, on the assumption of its being retained for sales in subdivision by the owner, should be assessed at a higher value than if it were sold to a hypothetical purchaser for similar development. In their Lordships' view it is impossible that the land should have two values, on the hypothesis required by the statute that it is sold in the open market by a willing seller. Both Kitto J. and Taylor J. in the case just cited dealt with this point in a manner that seems to their Lordships unexceptionable. The land in the hands of the owner is just capital for whatever purpose he chooses to put it. And if he chooses to employ his capital in a subdivisional scheme the profit he will make cannot in anticipation be taken to increase the value of the land before that profit has been realized. As Kitto J. among other passages puts it [7]: "There simply cannot be a difference between "the price which would be agreed upon between a businesslike "purchaser and a businesslike vendor and the amount which a "businesslike owner would treat himself as leaving invested in "the land in the event of his deciding to retain it"; or as Taylor J. says [8]: "The land at the relevant time was worth no more in "the hands of the appellant than it would have been in the hands "of some other owner who had acquired it with a view to sub-"division." The matter may be stated in another way. If the owner be regarded as a hypothetical purchaser of the land to be valued wishing to buy it for subdivision, he would not be expected to pay more for it than any other purchaser buying for the same purpose.

In these circumstances their Lordships' Board are unable to agree with the appellant's submissions. They consider, however, that the third head of the opinion expressed in the order of the Court of Appeal should be varied. This seems to proceed upon the view taken by a majority of the court that the case of *St. John's College Trust Board* [9] was correctly decided on its special circumstances, and leaves it open to the compensation court to

[7] 95 C.L.R.(Aus.) 245, 291.
[8] Ibid. 299.
[9] [1945] N.Z.L.R. 507.

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follow that decision if it thinks the facts warrant it. As the view of the Board is that that case was wrongly decided, and as in any event the Board cannot agree with the way in which this direction is expressed, their Lordships are of opinion that the direction should be as follows:

"(3) The court must contemplate the sale of the land as a "whole unless it appears that the necessary legal consents to a "subdivisional plan had been given and a survey on the ground "at the specified date would have disclosed that the land or some "part of it was in fact so far subdivided that the subdivided "parts could at that date have been immediately sold and title "given to individual purchasers, in which case the parts so sub-"divided may be separately valued, for the purpose of arriving "at the total amount of compensation."

For the reasons given, their Lordships will humbly advise Her Majesty that the appeal should be dismissed, but that the order of the Court of Appeal should be varied in the manner above expressed. The appellant must bear the costs of the appeal.

Solicitors: *Wray, Smith & Co.; Mackrell & Co.*

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[COURT OF APPEAL.]

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[Plaint No. 2915.]

Landlord and Tenant—Repairs—Act of 1938—*Effect of counter-notice claiming benefit—Subsequent proceedings by lessor for breach of repairing covenant—More than five years of term not then unexpired—Whether Act applicable—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146—*Leasehold Property* (*Repairs*) *Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1.

The plaintiffs were the landlords of premises let for a term of 99 years less seven days expiring on December 18, 1959. In 1953 the landlords served on the defendant, in whom the lease was then vested, a notice under section 146 of the Law of Property Act, 1925,[1] alleging breaches of the repairing covenants in the lease. The

[1] Law of Property Act, 1925, s. 146: "(1) A right of re-entry or for-"feiture under any proviso or stipula-"tions in a lease for a breach of any "covenant or condition in the lease "shall not be enforceable, by action "or otherwise, unless and until the "lessor serves on the lessee a notice— "(*a*) specifying the particular breach "complained of; and (*b*) if the breach "is capable of remedy, requiring the "lessee to remedy the breach; and "(*c*) in any case, requiring the lessee "to make compensation in money for "the breach; and the lessee fails, "within a reasonable time thereafter, "to remedy the breach, if it is "capable of remedy, and to make "reasonable compensation in money, "to the satisfaction of the lessor, for "the breach."

defendant served a counter-notice pursuant to the Leasehold Property (Repairs) Act, 1938,[2] claiming the benefit of that Act. In 1954 the defendant assigned the lease to a company and it was subsequently surrendered. These proceedings were started in 1957 by the landlords against the defendant for damages for breaches of the repairing covenants of the lease. The preliminary point was taken that the action was incompetent because the leave of the court under section 1 (3) of the Act of 1938 was a prerequisite to the jurisdiction of the court:—

Held, that effect could not be given to the purpose of section 1 of the Leasehold Property (Repairs) Act, 1938, unless a limitation was read into subsection (3) to make it consistent with subsections (1) and (2), and that in subsection (3) the provision that "no "proceedings shall be taken" by the lessor for breach of covenant or for damages for breach thereof must be read as "no proceedings "contemplated in the preceding subsections shall be taken" and, accordingly, that the leave of the court was only required where more than five years of the term remained unexpired.

Observations of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners* [1926] A.C. 37 applied.

Kanda v. *Church Commissioners for England* [1958] 1 Q.B. 332; [1957] 3 W.L.R. 353; [1957] 2 All E.R. 815 and *Cusack-Smith* v. *Gold* [1958] 1 W.L.R. 611; [1958] 2 All E.R. 361 considered.

APPEAL from Judge Sir Shirley Worthington Evans sitting at Clerkenwell County Court.

The plaintiffs, Elsie Ambler Baker and Harry Noel Venner, were the trustees of the will of Elisha Ambler, and in that capacity were lessees of 4, Mitchison Road, Islington. Elisha Ambler had by a lease dated May 9, 1862, subdemised those premises for a term of 99 years less seven days from December 25, 1860, at an annual rent of £5. This sublease contained a common form covenant to keep the premises in repair. That sublease was on August 27, 1931, assigned to the defendant, William Joseph George Sims. In April, 1953, more than three years before the

[2] Leasehold Property (Repairs) Act, 1938, s. 1: "(1) Where a lessor "serves on a lessee under subsection "(1) of section 146 of the Law of "Property Act, 1925, a notice that "relates to a breach of a covenant . . . "to keep . . . in repair . . . and at the "date of the service of the notice "five years or more of the term of "the lease remain unexpired, the "lessee may within 28 days from that "date serve on the lessor a counter-"notice to the effect that he claims "the benefit of this Act. (2) A right "to damages for a breach of such a "covenant as aforesaid shall not be "enforceable by action commenced at "any time at which five years or "more of the term of the lease "remain unexpired unless the lessor "has served on the lessee not less "than one month before the com-"mencement of the action such a "notice as is specified in subsection "(1) of section 146 of the Law of "Property Act, 1925, and where a "notice is served under this subsec-"tion, the lessee may within 28 days "from the date of the service thereof, "serve on the lessor a counter-notice "to the effect that he claims the "benefit of this Act. (3) Where a "counter-notice is served by a "lessee under this section, then, not-"withstanding anything in any enact-"ment or rule of law, no proceedings, "by action or otherwise, shall be "taken by the lessor . . . for "damages for breach thereof, other-"wise than with the leave of the "court. . . . (5) Leave for the pur-"poses of this section shall not be "given unless the lessor proves . . . "(etc.). (6) The court may, in grant-"ing or in refusing leave for the pur-"poses of this section, impose such "terms and conditions on the lessor "or on the lessee as it may think fit."

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end of the term, the plaintiffs had served a notice of want of repair on the defendant under section 146 of the Law of Property Act, 1925, and on May 5, 1953, the defendant served a counter-notice on the plaintiffs under section 1 of the Leasehold Property (Repairs) Act, 1938. On February 22, 1954, the defendant assigned his sublease to Alsen Properties Ltd. On December 5, 1955, that company surrendered the sublease to the plaintiffs.

In these proceedings the plaintiffs claimed £249 damages from the defendant on the ground that, while he was their sublessee, he had failed to keep the premises in repair. In his defence the defendant did not admit the dilapidations and he alleged that the plaintiffs had not obtained leave from the court under section 1 (3) of the Act of 1938. Alsen Properties Ltd. was brought in as third party.

The preliminary point of law was tried: whether the court had jurisdiction to hear the action, having regard to the fact that the plaintiffs had not first obtained the leave of the court to bring this action pursuant to the provisions of section 1 (3) of the Act of 1938. The plaintiffs contended that subsection (3) of section 1 did not apply where proceedings were brought within five years of the end of the term. The county court judge held that, since the plaintiffs had not obtained leave, the action was not maintainable and he entered a non-suit.

The plaintiffs appealed. The third party was not represented in the appeal.

B. C. Sheen for the plaintiffs.
F. Petre for the defendant.

The following decisions were referred to in argument which are not mentioned in the judgment: *Bagettes* v. *G. B. Estates Ltd.*[3]; *In re Lockwood*[4]; *Attorney-General* v. *Prince Ernest Augustus of Hanover*[5]; *Tinkham* v. *Perry*[6]; *Donovan* v. *Cammell Laird & Co.*[7]

LORD EVERSHED M.R. This appeal has raised a question of exceptional difficulty on the construction of the Leasehold Property (Repairs) Act, 1938.

The plaintiffs (who are appellants in this court) are the lessees of 4 Mitchison Road, Islington, under a lease for 99 years from December 25, 1860. An underlease had been granted of that term less the last seven days, which at the relevant date was vested in the defendant (respondent). The underlease would have expired on December 18, 1959, in any event; but it has in fact been surrendered.

The defendant acquired his interest in 1931; and in 1952

[3] [1956] Ch. 75; [1955] 3 W.L.R. 602; [1955] 3 All E.R. 457.
[4] [1957] 3 W.L.R. 837; [1957] 3 All E.R. 520.
[5] [1957] A.C. 436; [1957] 2 W.L.R. 1.
[6] [1951] 1 K.B. 547; [1951] 1 All E.R. 249.
[7] [1949] 2 All E.R. 82.

the plaintiffs took the view that there had been and was continuing to be a breach of the covenant for repair—which is in usual form, in a full repairing lease. A schedule of alleged breaches was prepared, and served upon the defendant, with a notice pursuant to the Act of 1938, in April, 1953. The defendant in the following month served a counter-notice under the same Act. Nothing, however, then transpired; no proceedings were taken; but in the following year, 1954, the defendant in fact assigned the unexpired remainder of his term under the sublease to a limited company, Alsen Properties Ltd. who were joined as third parties in these proceedings but who are not parties to this appeal. That third party, in December, 1955 (some four years, therefore, before the expiration by effluxion of time of the sublease), surrendered the term to the plaintiffs, and that surrender was accepted. In November of 1957 the present proceedings were commenced by way of a claim by the plaintiffs against the defendant for damages for breaches of the repairing covenant which, it was alleged, had been committed during the time that the defendant was the sublessee. The defendant brought in as third parties the Alsen company; but they are not concerned with this appeal.

When the matter came before Judge Sir Shirley Worthington Evans in the county court, the point was taken on behalf of the defendant that the action was incompetent, because the leave of the court to the commencement of the proceedings was a prerequisite for the jurisdiction of the court. Admittedly no leave had been asked for or obtained. Whether leave was required is the question which we now have to determine; and it turns particularly on the language of section 1 (3) of the Act of 1938. The county court judge came to the conclusion that the point taken by the defendant was well taken; that, in default of leave having been obtained, there was no right to sue; and he therefore dismissed the claim. It is from that decision, upon what was treated as a preliminary question of law, that the appeal comes to this court.

The argument (very briefly put) is, that, if you look at subsection (3) upon its own terms, with your mind unaffected and unbiassed by anything which you think is to be discerned from the other subsections in the same section, then the result is plain enough: it is, that, once a counter-notice has been served (and those last words I take from Mr. Petre's argument), then there is an absolute bar against proceedings of this kind without leave of the court.

Now in order to answer the problem it is necessary to have some regard to history; for one cannot (and so much Mr. Petre conceded) properly construe a particular paragraph in an Act of Paliament without at least having in one's mind the relevant context in which it appears. For present purposes, I must go back to the Law of Property Act, 1925, to make a reference to section 146, the well-known section which imposed a restriction

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on a landlord's right to forfeit or re-enter for breach of covenant. That, of course, was not novel. Section 146 was a re-enactment (though not in quite the same terms) of the previous restriction which appeared in the Conveyancing Act of 1881. Subsection (1) of section 146 is well known. It provides that a right of re-entry or forfeiture under any proviso or stipulation in a lease for breach of any covenant is not enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the breach requiring remedy, if it is capable of remedy, and requiring the lessee to make money compensation. Observe, that the restriction is one related only to re-entry or forfeiture but it is not limited to the particular breach of covenant on which the claim may be founded.

The Leasehold Property (Repairs) Act, 1938, picks up, so to speak, the matter from section 146, and confers a new benefit upon lessees, going beyond that given by section 146 but nevertheless (as will, I think, appear) in some respects at any rate, plainly enough, limited. Subsection (1) of section 1 of the Act of 1938 reads as follows: [His Lordship read subsection (1) and continued]:

Observe at this point that the effect of subsection (1) (briefly) is, first, that it is limited to cases where the section 146 notice is founded upon a breach of a repairing covenant: second, that it is limited to the case of a long term lease, where the house is of a small rateable value " and " (this being the vital point for present purposes) " at the date of the service of the notice " five years or more of the term of the lease remain unexpired " —given those conditions, then, if the section 146 notice is served (as it would have to be served), the lessee is given a right to serve a counter-notice claiming " the benefit of the Act."

Subsection (2) takes the matter a stage further and gives to the lessee a further right. That subsection no longer is confined to the case of the lessor seeking forfeiture or re-entry, but relates to a claim for damages—but again, a claim for damages only where the breach alleged is a breach of a repairing covenant; and once again you find this limitation that there must be, if the lessee is to have this right to claim the benefit of the Act, five years or more of his term unexpired. [His Lordship read subsection (2) and continued]:

In order to dispose of it at this stage, it is right to say that those provisions have been amended (in the lessee's favour) by section 51 (1) of the Landlord and Tenant Act, 1954, which provides: " The Leasehold Property (Repairs) Act, 1938 (which " restricts the enforcement of repairing covenants in long leases " of small houses) shall extend to every tenancy (whether of " a house or of other property, and without regard to rateable " value) where the following conditions are fulfilled, that is to " say " (and (*a*) relates to the length of the term of the tenancy) " . . . (*b*) that three years or more of the term remain unexpired " at the date of the service of the notice of dilapidations or, as

"the case may be, at the date of commencement of the action "for damages"; and then (*c*) excludes agricultural holdings.

The amending provision has no relevance to this particular case and I therefore shall proceed by assuming that the conditions as they were laid down in section 1 (1) and (2) of the Act of 1938 are the relevant conditions.

No question turns upon the rateable value of the house; but the vital matter again is that subsections (1) and (2) contemplate a restriction where (putting it briefly) five years or more of the term—the lessee's interest—remain unexpired.

So far it will be noted that the two subsections have conferred, in the circumstances, and the plainly limited circumstances, stated, a right to a lessee to claim "the benefit of this "Act." We have not been told yet what "the benefit" of the Act exactly is; but at this stage I find it useful to interpolate a reference to language used by Goddard L.J. in a case under this Act which came before the court in 1939: *National Real Estate and Finance Co. Ltd.* v. *Hassan.*[1] I refer to the judgment because the Lord Justice stated (and in my respectful view correctly stated) what the mischief was that the Act of 1938 was designed to remedy. The Lord Justice said[2]: "The "mischief it was designed to remedy was that occurring where "speculators buy up small property in an indifferent state of "repair, where any sort of schedule of dilapidations can be "served upon the tenants, which the tenants cannot comply "with. I am not saying that it applies to this case, but the "general mischief is that the speculator buys at a very low "price, turns out the tenants, and gets the reversion which "he has never paid for, which is a great hardship to the "tenants."

That passage makes quite clear the significance of the five-year period—a significance which, to my mind, is reinforced when you come to the later subsections. But so far, if Goddard L.J.'s view is right (as I humbly take it to be entirely right), then "the benefit" which the Act confers is plainly to be anticipated as something to protect the tenant of a small house where the tenant has a long term lease of which at any rate five years still remain to run: the landlord is not to be able, by exercising the rights of forfeiture or damages, to get for nothing (in effect) the reversion five years before it falls in.

I now come to the vital subsection (3). [His Lordship read subsection (3) and continued:]

Now the argument which found favour with his Honour, and which Mr. Petre has put before us with very great force, is this: If you read that subsection, the words of themselves, unilluminated (or, as he would say, undeflected) by anything which has gone before or will follow after, there is the benefit quite plainly stated—and again I revert to Mr. Petre's own

[1] [1939] 2 All E.R. 154. [2] Ibid. 161.

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words: once a counter-notice has been served then no action or proceeding to enforce, by way of forfeiture or claim for damages, the alleged breach of a repairing covenant, can be taken by the landlord save with the leave of the court.

In 1953 a counter-notice was in fact served by the defendant upon the plaintiffs; and so (Mr. Petre says; and the county court judge held) that puts a complete stop on the plaintiffs' right to sue for damages for breach of the repairing covenant; even though, when they bring their action, not only is there less than five years of the lease to run but where (as has happened in this case) the lease has ceased to exist altogether by virtue of surrender. If that view is right, it is again conceded by Mr. Petre that the results are far-reaching—and he admitted that they might, in certain circumstances, be remarkable, and indeed impose a real hardship upon a landlord. I will take, of the examples which Mr. Sheen put before us, one, to illustrate the point. Let it be supposed that, in the latter part of the year 1938, when the Act of 1938 had come into force, a notice of dilapidations was served upon the tenant. Let it be supposed that the tenant then served a counter-notice; but, good relations prevailing, let it be supposed that what was complained of was then put right, to the satisfaction of the landlord—that no proceedings were ever taken—and that there the matter remained for twenty years. Then in 1958—when (assuming no surrender) a year remains to go—serious damage is discovered to have been done to a wall or to the roof, since 1938. What is the right of the landlord? If Mr. Petre is right, he must then proceed to get the leave of the court—not, I understand, requiring any fresh service of any notices or anything of that kind, since, once a counter-notice has been served, the restriction is there: he (the landlord) must go to the court and get leave to bring the proceedings, though only a year remains of the lease. If that is right, it is quite plain that the restriction is one which is quite different from anything which you would suppose, from the reading of subsections (1) and (2), was going to follow: the five-year limit has ceased to have any relevance: and yet (as Goddard L.J. pointed out) the remedy designed for the mischief was to protect the lessee from the lessor who sought, while there was still a substantial period of time left to the lessee under his term, to try (in effect) to get the benefit of the reversion. In other words, if that view is right, it is plain that the benefit—the privilege—conferred by subsection (3) is something much more far-reaching than, and quite distinct from, anything contemplated or adumbrated by subsection (1) and subsection (2).

But the county court judge felt compelled to hold that that was the result. He drew attention in his judgment to the point that the words in the subsection are "Where a counter-notice "is served," and not (as it was contended the words would more naturally have been if such a wide and far-reaching restriction

was intended) "Once a counter-notice has been served." But he concluded that the words of subsection (3) were too compelling to allow him, by some interpolation, by some gloss upon the language, to make subsection (3) fit more closely with subsection (2) by injecting into subsection (3), by some means, the five-year period.

The view which the judge took is in fact at variance with the view which had been taken on exactly the same point by the official referee, His Honour Brett Cloutman, in *Dwellings Developments Ltd.* v. *Drake*.[3] Unfortunately, the county court judge did not have the advantage of seeing that case; but the official referee, in the report of his judgment, is recorded as saying this: "The defendant's argument" (which was the argument of the defendant here) "would indeed be formidable if subsection (3) were read in isolation, but if section 1 is read as a whole, the difficulty and the strange conclusion to which this argument lead both disappear. Reading subsections (2) and (3) together, it is, I think, plain that the proceedings by action or otherwise in subsection (3) (restricted to cases where the leave of the court has been obtained) are to be defined and limited in the same way as the action which is restricted in subsection (2) (that is, cases where a notice under section 146 of the Law of Property Act, 1925, is to be served). In each case the action restricted is one commenced at any time at which five years or more of the term remain unexpired. I do not think that actions within the five-year period are affected, nor are actions commenced after the expiration of the term. To hold otherwise would not further the general purposes of the Act, and, on the other hand, would seem to result both in injustice and, as I think, absurdity." Whether it is necessary to go the length of using the word "absurdity" is, perhaps, another matter; but on the general view which the official referee expressed I have come to the conclusion, on the whole, that I would agree with him.

I have referred to the proleptic phrase "the benefit of the Act" in subsections (1) and (2). I have referred to the language of Goddard L.J. stating the mischief which this Act was designed to remedy. I would add at this point one further matter which has struck me a little forcibly. It will be recalled that subsection (3) says: "Where a counter-notice is served by a lessee under this section, then, notwithstanding anything in any enactment or rule of law. . . ." It would appear that if the argument for the defendant here is right, then "any enactment" referred to would have to include, or should safely include, subsections (1) and (2); because subsections (1) and (2) plainly are limited to cases where five years of the term still remain to run; and it would be very strange, and, as I think, inconsistent, if subsection (3) is to be read so independently as, by its express terms, to

[3] (1954) 163 E.G. 192, 193.

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exclude something which is contained or necessarily implied in the immediately preceding subsections in the same section.

But that is not quite all. I can leave out subsection (4) which relates to form rather than substance, and pass to subsection (5) of the same section: "Leave for the purposes of this section"—not, be it observed, "for the purposes of subsection (3) of this "section," but "for the purposes of this section"—"shall not "be given unless the lessor proves (*a*) that the immediate "remedying of the breach in question is requisite for preventing "substantial diminution in the value of his reversion" (etc.); "(*b*) that the immediate remedying of the breach is required for "giving effect in relation to the house to the purposes of any "enactment, or of any byelaw" and similar matters; "(*c*) in a "case in which the lessee is not in occupation of the whole of the "house, that the immediate remedying of the breach is required "in the interests of the occupier. . . . (*d*) that the breach can be "immediately remedied at an expense that is relatively small in "comparison with the much greater expense that would probably "be occasioned by postponement" and so on; and then (*e*), "special circumstances which, in the opinion of the court, render "it just and equitable that leave should be given."

It will be noticed that every one of the paragraphs (*a*) to (*d*) inclusive is emphasizing the point which I would put in the form of a question: Is the immediate remedying of this breach really called for in the proper interests of the reversioner? Not one of those paragraphs would have—obviously—the slightest significance or application save where an appreciable period of the term remained unexpired; and could obviously have no possible significance where the term had been altogether surrendered. It is true that paragraph (*e*) is in perfectly general terms—"special "circumstances which in the opinion of the court, render it just "and equitable. . . ." But, having regard to the purposes of the Act, I must confess that I cannot see how the landlord, in a case such as this, could really apply himself to proving "special "circumstances" which would "render it just and equitable." Having regard to the general scope of the Act, where the lease is expired I should have thought that the court, if applied to, would be bound to give leave: the question of "special circumstances" could not, I venture to think, arise at all. And if that is right, it seems to me to follow quite plainly that subsection (5) is drawn on the unmistakable assumption or premise that leave will be asked for and is only requisite in cases where an appreciable part of the term of the lease remains unexpired. In other words, it is consistent, and really only consistent, with the view that the restriction is the one adumbrated by subsections (1) and (2) of the section, namely, a restriction where five years or more of the lease remain unexpired.

A little further support, I think, is given to that by subsection (6): "The court may, in granting or in refusing leave for the pur- "poses of this section, impose such terms and conditions on the

" lessor or on the lessee as it may think fit "—a formula quite inapplicable to a case such as the present.

Finally, I would briefly refer to section 2, which restricts the right of the lessor to recover expenses which he had a right to recover under section 146 of the Law of Property Act, and which uses the phrase " unless he makes an application for leave for " the purposes of the preceding section "—again not, be it noted, " for the purposes of subsection (3) of the preceding section." The point is, no doubt, a small one, but it lends, I think, some force to Mr. Sheen's argument that you cannot properly interpret section 1 in such a way as would make subsection (3) confer an altogether independent right on the lessee—independent, that is, of the restrictions adumbrated plainly enough by subsections (1) and (2).

In the light of all those circumstances, I have felt compelled to the view that to interpret subsection (3) in the sense which found favour with the county court judge is really to misinterpret the parliamentary intention as found in the section read as a whole.

We had our attention drawn to a number of passages in Maxwell on the Interpretation of Statutes, and to a number of cases. It is not in doubt that you will find support for many propositions on the interpretation of statutes—not always consistent with each other—in the books; and particularly in Maxwell. But without in any way qualifying the general rule that the court's duty is to interpret the parliamentary language and not to substitute for it what the court may feel would have been a much better idea, it is, I think, legitimate and proper to read and rely upon such a principle as this: " Where the language of a statute " (I am reading from p. 229 of the tenth edition) " in its ordinary meaning " and grammatical construction, leads to a manifest contradiction " of the apparent purpose of the enactment, or to some inconveni- " ence or absurdity, hardship or injustice, presumably not " intended, a construction may be put upon it which modifies the " meaning of the words, and even the structure of the sentence." Lord Dunedin, in *Whitney* v. *Inland Revenue Commissioners*,[4] said: " A statute is designed to be workable, and the interpreta- " tion thereof should be to secure that object, unless crucial " omission or clear direction makes that end unattainable."

I have come to the conclusion here that you cannot give effect to what I regard as the manifest purpose of this Act, dealing with a particular mischief, unless you do read into subsection (3) the requisite limitation to make it consistent with subsections (1) and (2). Mr. Petre forcefully said: " It is all very well, but what are " the words you are going to read in? "; and that argument must be met. I think the answer is that the words " no proceedings," in the context, and following, as they do, the reference to a " counter-notice served under this section," must be treated as

[4] [1926] A.C. 37, 52.

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meaning " no relevant proceedings," or " no such proceedings "; or, put in another way, that " no proceedings . . . shall be taken " ought to be read as meaning " the proceedings contemplated in " the preceding subsections of this section shall not be taken." I do not shrink from the fact that my conclusion involves no doubt an appreciable and substantial gloss upon the strict terms of the subsection. But it is only by so interpreting them that I can achieve the consistency in the subsection which a reading of the whole section seems to me inevitably to demand. And I am comforted to this extent: such a reading of the section cannot be condemned as wholly irrational. In the case, which came before this court, of *Kanda* v. *Church Commissioners for England* [5] Morris L.J. used this language in reference to this section.[6] " There might, however, be circumstances in which an assignee " who had gone into possession had proceeded at once to remedy " all disrepair and to bring it about that the premises were in a " condition that satisfactorily complied with the covenants of a " lease. It might be, therefore (and it is to be remembered that " the provisions now under consideration only apply where more " than three years of the term of a lease remain unexpired), that " a court would not necessarily be disposed to give leave to take " proceedings against an assignee." That was a case in which the question was raised whether a judgment should be set aside because leave had not been given as against a particular party. It is, however, true to say that the particular point with which we are concerned was never debated. My brother Pearce, who was then sitting with Morris L.J., has told us quite plainly that the matter never was in their minds at all. I only, therefore, refer to that passage in support of what I have said—that you cannot condemn as irrational, or on the face of it wrong, a reading of subsection (3) in the sense in which I would interpret it, which happens to be the way in which Morris L.J. read the whole section. And Morris L.J. is not, after all, entirely alone. I have earlier read subsection (1) of section 51 of the Landlord and Tenant Act, 1954; and it will be remembered that one of the conditions, (*b*), is expressed thus, that " three years or more of the term " remain unexpired at the date of the service of the notice of dilapi- " dations or, as the case may be, at the date of commencement of " the action for damages "—showing plainly enough that Parliament interpreted section 1 of the Act of 1938—including subsection (3)—as only applicable in the class of case in which Morris L.J. thought it only applicable, namely, where five years or more of the term remain unexpired.

I again wish to protect myself by observing that I am fully aware that if an earlier Act leads to a plain result, or a result which the court thinks is in accordance with the proper interpretation of its terms, then you cannot twist them because Parliament later thought they meant something else. But where there is a

[5] [1958] 1 Q.B. 332; [1958] 3 W.L.R. 990; [1957] 2 All E.R. 815.

[6] [1958] 1 Q.B. 332, 343.

fair ambiguity it is, on the other hand, permissible (if it is otherwise justifiable) to prefer a meaning which was the meaning that Parliament later attributed to the language in another Act in pari materia.

For these reasons, therefore, I have come to the conclusion, with all respect to his honour, that in this case the objection taken was not well-founded, and that no leave of the court was required for this particular proceeding.

Before I leave the case I ought to refer to *Cusack-Smith* v. *Gold*.[7] That was an action before Pilcher J. of a somewhat complicated kind. The substance of it was an action for damages for breach of a repairing covenant; and the plaintiff had got before the court no less than ten defendants. The tenth defendant was one who had a limited interest as a sublessee at the time when a notice on the landlord's part under section 146 and pursuant to subsection (2) of section 1 of the Act of 1938 was served. The tenth defendant was not directly served, but the notice was apparently pinned to the premises, and the judge held that that operated as service upon the tenth defendant. He (the tenth defendant) did not himself serve a counter-notice; but the ninth defendant—a limited company on whom the landlord's notice was directly served—had served a counter-notice. By the time that the action was commenced the tenth defendant's interest had wholly terminated; but he was joined as a defendant and sued in respect of his responsibility for the alleged breaches of covenant. He took the point that the action was not competent at any rate against him because no leave had been obtained to serve him, the tenth defendant. The judge rejected that view, and he interpreted the word "lessee" in the relevant parts of the 1938 Act, as amended, as excluding the tenth defendant, who, when the action started, had no interest in the premises at all. The case was, therefore, somewhat relied upon by Mr. Sheen, because, of course, when this action was started the lease was surrendered and there was, therefore, no lessee. On the other hand, the point here was different, because beyond question, the defendant here, had served a counter-notice, which the tenth defendant in *Cusack-Smith* [7] had not. Therefore (as Mr. Sheen conceded) this case was not of itself sufficient to carry him home. I would, for my part, prefer to express no view on the particular ground upon which Pilcher J. decided the *Cusack-Smith* case [7]: it is not necessary for the decision of this case and, therefore, I say no more about it, and I must not thereby be taken either as approving or as disapproving the particular construction of the word "lessee" which there commended itself to Pilcher J. That matter can await a further occasion on which such a point must directly be decided.

For the reasons which I have tried to state, in this most difficult and complicated case I have come to the conclusion that this appeal should be allowed. What the exact consequences of

[7] [1958] 1 W.L.R. 611; [1958] 2 All E.R. 361.

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allowing the appeal are, we can discuss when my brethren have delivered their judgments.

SELLERS L.J. I agree that the appeal should be allowed; and I agree so fully with what my Lord has said that I have nothing of substance to add to it.

I feel some sympathy with the county court judge because it is clear that different views may be taken of this matter and he had not the advantage of having before him a judgment which had been delivered by Sir Brett Cloutman sitting as an official referee. The helpful arguments of both the counsel have further revealed the difficulties involved in the interpretation of the Leasehold Property (Repairs) Act, 1938. It is a short Act, and, so far as I can see, it relates only to leases where the unexpired term is five years or more: that is the ambit of its operation. It would not be, I think, within the purpose and compass of the whole scheme to enlarge the interpretation of subsection (3) in the manner which has been submitted by learned counsel and was acceded to by the judge in the court below. I agree, as has been argued, that the words are specific, because there is no doubt that the enforcement by action for damages where the unexpired period of a lease is five years or more is restricted. Subsection (3) definitely provides the restriction. It gives the "benefit of the Act," as it is said in subsections (1) and (2), to the lessee that he cannot be proceeded against under either proceeding unless there has been the leave of the court. But I do not find that subsection (3) is otherwise specific as to its time of operation when the Act as a whole is looked at. Its scheme, it seems to me, indicates that the subsection can only be invoked when the lessor is attempting to do that which the previous subsections deal with—in this case to claim for damages for failure to repair when the unexpired period is as great as therein specified. Here there is in fact no unexpired period at all: the lease had been surrendered. I prefer the view which my Lord has stated—that the amended defence relied on in this case cannot prevail and that the action was properly constituted—and I suppose must be restored for consideration.

PEARCE L.J. I agree with all that has been said.

The serving of a counter-notice entitles the tenant to "the "benefit of the Act." Section 1 as a whole seems to make it clear that the intended "benefit of the Act" is that proceedings shall not be brought without leave until the five-year period starts. Did the Legislature, by subsection (3), intend to add a further somewhat irrational benefit, with no merits, in certain cases, encroaching on the whole of that five-year period? On reading the section of the Act as a whole I cannot believe that that was intended. It is true that the words "no proceedings "shall be taken" in subsection (3), when read in isolation, seem

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to have that result; and I fully sympathise with the difficulties which were felt by the judge; but, when those words are read with the rest of the section and the rest of the Act, it becomes clear, in my opinion, that that was not their intended meaning, and that the prohibition is intended to refer only to proceedings before the five-year period.

For that reason, and for the other reasons, all of which have been so fully and clearly set out by my Lord in his judgment, I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *Herbert Reeves & Co. for Kellock & Cornish-Bowden, Totnes, Devon; Crane & Hawkins.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* MINERVINI.

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Lord Parker C.J., Cassels and Streatfeild JJ.

Extradition—Offence committed on board ship—Jurisdiction of magistrate—No proof of ship's position at time of offence—Whether ship "territory" of contracting power—Extradition Act, 1870 (33 *&* 34 *Vict. c.* 52), *s.* 25—*Order in Council dated September* 30, 1873, *arts.* 1, 2.

Extradition—Habeas corpus—Right of requisitioning government to appear—R.S.C., Ord. 59, *r.* 17.

The applicant, an Italian seaman, was accused of having murdered another seaman on board a Norwegian ship. On arrival at a British port the applicant was committed to Brixton prison by the chief metropolitan magistrate to await extradition to Norway. On an application for a writ of habeas corpus it was submitted that as the position of the ship at the time of the alleged crime had not been proved, it was not proved that the crime was committed "in "the territory" of Norway, and that the provision of article 1 of the Extradition Treaty of June, 1873, between Norway and the United Kingdom that: "The high contracting parties engage to "deliver up to each other, persons who, being accused . . . of a "crime committed in the territory of the one party, shall be found "within the territory of the other party . . ." only applied to crimes committed on land and, therefore, the offence in question was not extraditable or, alternatively, even if "territory" was to be given a wider meaning it would not include a ship within the territorial waters of a third power:—

Held, (1) on an application for habeas corpus where the applicant is detained pending an order of extradition, the court has power under R.S.C., Ord. 59, r. 17, to direct that the notice of motion be served on the requisitioning government.

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Quaere, whether the the requisitioning government can appear before the court as of right.

(2) That, on the construction of article 1 of the Treaty of June, 1873, and having regard to the list of extraditable crimes set out in article 2 (which included certain assaults committed on ships on the high seas, conspiracy and revolt on board ship) "territory" in article 1 was not to be treated in its strict sense but as equivalent to "jurisdiction" and, therefore, included Norwegian ships; that even if the ship had been in the territorial waters of a third power at the time of the crime, it would not have affected the matter for it would simply have given rise to a jurisdiction competing or concurrent with that of the Norwegian Government, and, accordingly, it was unnecessary for the chief magistrate to have evidence of the position of the ship at the time of the commission of the crime before committing the applicant, and he had jurisdiction to make the order of committal.

APPLICATION for writ of habeas corpus.

The applicant, Onofrio Minervini, applied by leave of Edmund Davies J., given on September 1, 1958, for a writ of habeas corpus addressed to the Governor of Brixton Prison where the applicant was detained on an order made by Sir Laurence Dunne, Chief Metropolitan Magistrate, at Bow Street on August 25, 1958, under the Extradition Acts, 1870 [1] and 1873, consequent on a request for extradition by the Norwegian Government on the ground of the alleged murder of Sigurd Aas on board the Norwegian motor tanker *Vanja*. The applicant claimed that the committal was unlawful on the ground that there was no evidence before the magistrate as to the position of the ship at the time of the alleged crime and that, accordingly, it was not proved that the alleged crime was committed within the territory of the Kingdom of Norway as provided by the Treaty set out in an Order in Council dated September 30, 1873.[2]

Further, that, in any event, a Norwegian ship was not part of the territory of Norway and that the alleged crime was not therefore extraditable under the Treaty.

[1] Extradition Act, 1870, s. 25: "For the purposes of this Act, every "colony, dependency, and constituent "part of a foreign state, and every "vessel of that state, shall (except "where expressly mentioned as dis-"tinct in this Act) be deemed to be "within the jurisdiction of and to be "part of such foreign state."

[2] Order in Council, dated September 30, 1873 (Sweden and Norway), Art. I: "The high contracting par-"ties engage to deliver up to each "other those persons who, being "accused or convicted of a crime com-"mitted in the territory of the one "party, shall be found within the "territory of the other party, under "the circumstances and conditions "stated in the present Treaty."

Art. II: "The crimes for which "extradition is to be granted are the "following:

"1. Murder . . . or attempt to "murder. . . . 16. Sinking or destroy-"ing a vessel at sea, or attempting to "do so. 17. Assaults on board a ship "on the high seas, with intent to "destroy life or to do grievous bodily "harm. 18. Revolt, or conspiracy to "revolt, by two or more persons on "board a ship on the high seas "against the authority of the master; "except, as regards Norway, conspir-"acy to revolt."

Order in Council directing that the Extradition Acts shall apply in the case of the Kingdom of Norway. 1907, No. 545.

Leonard Caplan Q.C. and *Lawrence Verney* for the applicant.

Sir Frank Soskice Q.C. and *Quentin Edwards* for the Norwegian Government.

R. E. Seaton for the Governor of Brixton Prison.

Counsel for the applicant took the preliminary point that the Norwegian Government had no locus standi before the court.

Caplan Q.C. It was decided by Piggott C.J. in *Rex* v. *Li Yu Mui*,[3] a decision in Hong Kong, that a power seeking extradition had no locus standi in habeas corpus proceedings. Having made a request for extradition its power ended and the sole party concerned is the British Government which is seeking to perform its obligations under its treaty with Norway and to justify before the courts the detention of the applicant. The only person to whom the writ was directed was the Governor, it was not served on the Norwegian Government, the affidavit of the applicant was merely sent to them as a matter of courtesy.

Sir Frank Soskice Q.C. R.S.C., Ord. 59, r. 17, makes it clear that the writ may be served on any person as the court may direct. The court is asked to direct that notice should be served on the Norwegian Government. The controversy was between the applicant and that government. In *Reg.* v. *Governor of Brixton Prison, ex parte Kolczynski*[4] Lord Goddard C.J., in granting habeas corpus, commented that the Polish Government in that case were not represented and could not therefore complain of the result, which was authority for the presence of a foreign government in such proceedings. It is understood that foreign governments are habitually present in court in these proceedings. If Piggott C.J. is right all these appearances are contrary to law.

R. E. Seaton addressed the court in support of the presence of the Norwegian Government.

[LORD PARKER C.J. On this preliminary point Mr. Caplan raised a matter of principle, namely, whether on an application such as this the requisitioning government is entitled to be heard. We, however, find it unnecessary in the present case to decide that point of principle. We think that under R.S.C., Ord. 59, r. 17, the court has power in a proper case to direct that the notice of motion be served on the representative in this country of the requisitioning government so that the court can have the benefit of their views. We think that in the present case it would have been proper and convenient to give such a direction and though no direction was in fact given, Sir Frank is here representing the Norwegian Government, and we will hear him should the occasion arise.]

The court then heard argument on the main issue.

[3] (1910) 5 Hong Kong L.R. 227.

[4] [1955] 1 Q.B. 540, 550; [1955] 2 W.L.R. 116.

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The following cases were referred to in argument: *Wildenhus's Case* [5]; *Reg.* v. *Wilson* [6]; *In re Windsor* [7]; *R.* v. *Jamison.* [8]

LORD PARKER C.J. In these proceedings Mr. Caplan moves on behalf of Onofrio Minervini, an Italian subject, for a writ of habeas corpus. The applicant is now detained in Brixton Prison on an order of the chief magistrate dated August 25 committing him to Brixton to abide an order of extradition made by the Secretary of State.

The matter arises in this way: Apparently this man was a seaman on the Norwegian motor tanker *Vanja*, and he is accused of having on July 20, 1958, murdered one Sigurd Aas on board that vessel. There was no specific evidence as to the geographical position of the vessel at the time when this alleged murder is said to have taken place. All that we know is that it was some six days' steaming from a British port. The extradition proceedings were started as the result of a request by the Government of the Kingdom of Norway under whose flag the *Vanja* was and evidence was produced to the chief magistrate and he committed the applicant to Brixton.

Mr. Caplan has raised two points in a very careful and ingenious argument. The first one is this: He says that before the chief magistrate could have jurisdiction he must be satisfied by evidence which, if true, shows that the applicant was accused of an extradition crime, and for that purpose Mr. Caplan says that you must look at the Treaty and see if the evidence before the chief magistrate brings the case within the Treaty. The Treaty in question here was one made between Her Majesty Queen Victoria and the Governments of Sweden and Norway dated June 26, 1873, and pursuant to the Extradition Act, 1870, this Treaty was made the subject of an Order in Council dated September 30, 1873, applying to it the provisions of the Act of 1870. In 1907 there was a further Order in Council applying the provisions of that Treaty of June, 1873, with slight alterations, which are immaterial, to the Kingdom of Norway alone.

By article 1 of the Treaty of June, 1873, it was provided: "The high contracting parties engage to deliver up to each "other those persons who, being accused or convicted of a crime "committed in the territory of the one party, shall be found "within the territory of the other party, under the circumstances "and conditions stated in the present treaty." Mr. Caplan says that of course in the ordinary way "territory" and "jurisdiction" are two completely separate notions. "Territory" he would define as an area of the globe consisting of land with, he admits, the territorial waters adjoining it. That being so, he says here that a vessel on the high seas cannot be in any sense territory, at any rate if the ship is outside territorial waters.

[5] (1886) 120 U.S.Rep. 1.
[6] (1877) 3 Q.B.D. 42.
[7] (1865) 6 B. & S. 522.
[8] [1896] 2 Q.B. 425.

The difficulty in his way here is that, when one goes to article 2 and looks at the list of the crimes which shall be treated as extradition crimes, one finds under paragraph 16: "Sinking or "destroying a vessel at sea or attempting to do so. 17. Assaults "on board a ship on the high seas, with intent to destroy life "or to do grievous bodily harm. 18. Revolt, or conspiracy to "revolt, by two or more persons on board a ship on the high "seas against the authority of the master." True, in general, one would not construe article 1 or extend the ordinary meaning of article 1 by reference to article 2 if it could be avoided, and he says there is no real conflict between article 1 and article 2. Paragraphs 16, 17 and 18 can, he contends, be treated as referring to offences on vessels while within the territorial waters of Norway because "high seas" in its ordinary meaning means high seas from low-water mark and therefore would include territorial waters. It seems to me that to read the provisions in that way is just nonsense. It is absurd to think that extradition proceedings will lie if a murder is committed just inside territorial waters and will not lie if it is alleged to have been committed just outside territorial waters. This Treaty is not treating "territory" in its strict sense, but in a sense which is equivalent to jurisdiction, and it is only in that way that one can make sense of the Treaty. Indeed, it is to be observed that in many of these treaties reference is made not to territory but to jurisdiction, and, in my view, in this Treaty "territory" is equivalent to jurisdiction. It is also relevant I think in this connexion to consider the terms of the Extradition Act, 1870. Mr. Caplan says, quite rightly, that you cannot enlarge the scope of the Treaty by looking at the Act. With that I entirely agree, but in construing the words of the Treaty one is entitled to look at the Act itself. After all, the two contracting parties in 1873 must have had in mind the Act of 1870 and the fact that an Order in Council would be made referring to the Treaty and applying to it the provisions of the Act. By section 25 it is provided: "For the purposes of this Act, every colony, depen-"dency, and constituent part of a foreign state, and every "vessel of that state, shall (except where expressly mentioned "as distinct in this Act) be deemed to be within the jurisdiction "of and to be part of such foreign state." That no doubt is a provision for interpreting the Act. It begins: "For the "purposes of this Act," but nevertheless it seems to me a provision which one cannot ignore when one is considering the meaning of the Treaty which was to be the subject of an Order in Council applying the provisions of the Act. In my view Mr. Caplan's first argument fails.

The second way in which he puts the case is this: Assuming he is wrong and "territory" must be given some meaning more than its ordinary meaning, yet it is impossible to say that it covers a ship at sea when it is within the territorial waters of a third power because he says that that would be a gross breach

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Lord Parker C.J.

of international comity; it would be legislating in respect of foreign territory and also deeming something which was within that foreign territory to be the territory of a foreign country. In my view, it is quite unnecessary here to consider what is the true position of a ship; whether the country whose flag is flown merely has jurisdiction over the ship and those on board or whether it is to be treated for certain purposes as the territory of that power. I find it unnecessary to go into those matters because if I am right in saying that "territory" in article 1 of the Treaty is equivalent to "jurisdiction," then assuming that the ship was at the time of the alleged murder within the territory of a foreign power, it would be only a matter of competing jurisdiction and no one suggests it is wrong to legislate to provide for competing or concurrent jurisdiction. Accordingly, it matters not in this case whether the ship was in the middle of the North Sea, in the territorial waters of Norway or of this country or of any other power. The Norwegian Government had jurisdiction, and that is sufficient to enable these proceedings to be brought. Accordingly, it was unnecessary for any evidence to be tendered before the chief magistrate to show the position of the vessel and he had jurisdiction to make the order which he did. I would dismiss this application.

CASSELS J. I agree.

STREATFEILD J. I also agree and have nothing to add to the judgment of my Lord.

Solicitors: *Crawley & de Reya; Director of Public Prosecutions; Neil Maclean & Co.*

J. D. P.

[PRIVY COUNCIL.]

J. C.* 1958 *Oct.* 14.

EWA PERKOWSKI . . . . . APPELLANT;

AND

WELLINGTON CORPORATION . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Licensor and Licensee—Licensee—Duty of occupier—Fatal dive into shallow water—No concealed danger—Local authority occupier of diving board—Deceased a licensee—No general duty of care.

Licensor and Licensee—Invitee or licensee—Duty of occupier—Distinction.

Court of Appeal—Argument not raised below—Discretion of appellate court to entertain—New Zealand.

New Zealand—Negligence.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW, LORD DENNING.

The appellant's husband died as a result of injuries suffered when he dived at low tide from a spring-board into shallow water. The board, which was on a platform at the end of a wooden duck-walk, had been erected some years earlier by the respondent corporation at the request of a swimming club to replace a previous board. The platform was on a concrete support set in the harbour bed (which was vested in the Marine Department). On a claim for damages brought by the appellant against the corporation under the Deaths by Accident Compensation Act, 1952, on the basis that the deceased was a licensee, the jury found, inter alia, that the corporation were the occupiers of the premises comprising the spring-board —which was not challenged—and that the spring-board did not constitute a concealed danger at low tide:—

Held, that as a licensee the deceased must take the land as he found it, and the corporation as occupiers owed him no general duty of care other than to warn him against concealed dangers in the nature of a trap—which the jury's answer negatived. There could be no logic in drawing a distinction between the state of the land when the occupier went into occupation and its state when changes had been made by him. Further, the fact that the concealed danger was that of injury outside the occupied area, whether in the sea or on a highway or in adjacent property, on principle would not seem to prevent the application of the rule.

Latham v. *R. Johnson & Nephew Ltd.* [1913] 1 K.B. 398; 29 T.L.R. 124 applied.

Slater v. *Clay Cross Co. Ltd.* [1956] 2 Q.B. 264; [1956] 3 W.L.R. 232; [1956] 2 All E.R. 625 distinguished.

Observations on raising, in appellate courts, points of law not taken in the courts below.

The appellant, not having taken at the trial the point that the deceased was an invitee to whom the corporation owed a general duty of care, could not be permitted to take it on appeal.

Dicta of Lord Birkenhead L.C. in *North Staffordshire Railway Co.* v. *Edge* [1920] A.C. 254 at 263; 36 T.L.R. 115, and *Connecticut Fire Insurance Co.* v. *Kavanagh* [1892] A.C. 473; 8 T.L.R. 752 considered.

Judgment of the Court of Appeal of New Zealand [1957] N.Z.L.R. 39 affirmed.

APPEAL (No. 9 of 1958), by special leave in forma pauperis, from a judgment of the Court of Appeal of New Zealand (Barrowclough C.J., Stanton and Adams JJ.) (October 12, 1956) dismissing the present appellant's appeal from a judgment of the Supreme Court of New Zealand (Hutchinson J. with a jury) (November 17, 1955) whereby, following argument after verdict on the findings of the jury, judgment was entered for the present respondents, the Corporation of Wellington.

The following facts are taken from the judgment of the Judicial Committee: The plaintiff's husband died on January 10, 1954, as a result of injuries suffered on the day before when he dived from a spring-board at Worser Bay in the City of Wellington. The claim was brought under the Deaths by Accident Compensation Act, 1952.

The jury were asked first whether the defendant corporation was the occupier of the premises comprising the spring-board.

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The defendants were admittedly occupiers of the land above high-water mark and certain off-shore rocks, but submitted that they were not occupiers of the spring-board. The board was on a platform at the end of a wooden duck-walk, the platform being on a concrete support set in the harbour bed. The defendants relied on this and also on the fact that they had put up the board at the request of a swimming club. The jury found that the defendants were the occupiers of the premises comprising the spring-board and neither side now challenged that finding. The deceased had bathed in Worser Bay and dived from the board on a number of previous occasions. The plaintiff put her case on the basis that the deceased was a licensee. The judge accepted this and so directed the jury. No exception was taken by counsel to that. It was conceded that if the board constituted a concealed danger the defendants had knowledge of it.

The jury were asked as question 1 (2) whether the spring-board constituted a concealed danger at low tide? They answered, No.

1958. July 10, 14, 15, 16 and 17. *B. MacKenna Q.C., J. G. Le Quesne* and *Robin Cooke* for the appellant.

H. A. P. Fisher for the respondent corporation.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Grant* v. *Sun Shipping Co. Ltd.*[1]; *London Passenger Transport Board* v. *Upson*[2]; *Riden* v. *A. C. Billings & Sons Ltd.*[3]; *Slade* v. *Battersea and Putney Hospital Management Committee*[4]; *Dunster* v. *Abbott*[5]; *Perth Corporation* v. *Watson*[6]; *Thompson* v. *Bankstown Corporation*[7]; *South Australian Co.* v. *Richardson*[8]; *Caldwell* v. *Village of Island Park*[9]; *Nickell* v. *Windsor*[10]; *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck*[11]; *Boy Andrew (Owners)* v. *St. Rognvald (Owners)*[12]; *Simmons* v. *Huntingdon Corporation*[13]; *Hawkins* v. *Coulsdon and Purley Urban District Council*[14]; *Fairman* v. *Perpetual Investment Building Society*[15]; *Murdock* v. *A. & R. Scott*[16]; *London Graving Dock Co. Ltd.* v. *Horton*[17]; *Pfister* v. *Toronto Transportation Commission*,[18] and *Brown* v. *B. & F. Theatres Ltd.*[19]

[1] [1948] A.C. 549; [1948] 2 All E.R. 238.
[2] [1949] A.C. 155; 65 T.L.R. 9; [1949] 1 All E.R. 60.
[3] [1957] 1 Q.B. 46; [1956] 3 W.L.R. 704; [1956] 3 All E.R. 357; (H.L.) [1957] 3 W.L.R. 496; [1957] 3 All E.R. 1.
[4] [1955] 1 W.L.R. 207.
[5] [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572.
[6] (1915) 18 W.A.L.R. 8.
[7] (1953) 87 C.L.R.(Aus.) 619.
[8] (1915) 20 C.L.R.(Aus.) 181.
[9] (1952) 304 N.Y.Rep. 268.
[10] [1927] 1 D.L.R. 379.
[11] [1929] A.C. 358; 45 T.L.R. 267.
[12] [1948] A.C. 140.
[13] [1936] 1 All E.R. 596.
[14] [1954] 1 Q.B. 319; [1954] 2 W.L.R. 122; [1954] 1 All E.R. 97.
[15] [1923] A.C. 74; 39 T.L.R. 54.
[16] 1956 S.C. 309.
[17] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.
[18] [1946] 3 D.L.R. 71.
[19] [1946] 3 D.L.R. 194.

Oct. 14. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and continued: There was ample evidence on which the jury could find that the spring-board did not constitute a concealed danger at low tide. Some of the plaintiff's own witnesses said that the water was clear and its shallowness at low tide apparent.

At the trial the plaintiff submitted that the defendants, if not occupiers, would have been under a duty as erectors of the board to take reasonable care for those who might use the board, and that that duty was broken by a failure to put up a warning notice or a tide gauge. The judge was doubtful at the time when he summed up whether there would, if the defendants were not occupiers, be such a duty. He formulated, however, the following three questions which on his summing up did not arise if the jury answered the first question as to occupancy as they did.

2. Was the defendant negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide-gauge? Answer, Yes.

3. Was the deceased negligent in a manner causing or contributing to the fatality? Answer, Yes.

5. If both the defendant and the deceased were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that the total damages be reduced having regard to the share of the deceased in the responsibility for the fatality? Answer, 80 per cent.

If the only liability on the defendants was to warn against concealed dangers these findings do not avail the plaintiff, and counsel for the appellant agreed that the appeal must fail. It was, however, submitted that for differing reasons the defendants were under a general duty to the plaintiff, and that the finding could be relied on as establishing a breach of that duty.

It was submitted for the defendants that the answer to question 2 was one which should be disregarded as perverse and inconsistent with the answer to question 1 (2). It was further submitted that as the finding in answer to question 2 was on the basis that the defendants were not occupiers it could not avail the plaintiff (the defendants having been found to be occupiers), even if she succeeded in establishing some general duty of care owed to the deceased. It is unnecessary to consider these submissions, because, for reasons which will be given, the plaintiff fails to establish a general duty of care.

The authorities on the duty of occupier to licensee were considered by Farwell L.J. and Hamilton L.J. in *Latham* v. *R. Johnson & Nephew Ltd.*[1] Farwell L.J. quotes with approval a statement by Williams J. in *Hounsell* v. *Smyth*,[2] adopted by Wightman J. in *Binks* v. *South Yorkshire Railway Co.*[3] "No right is alleged: "it is merely stated that the owners allowed all persons who

[1] [1913] 1 K.B. 398, 404; 29 T.L.R. 124.

[2] (1860) 7 C.B.(N.S.) 731.

[3] (1862) 3 B. & S. 244, 252.

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"chose to do so, for recreation or for business, to go upon the "waste without complaint—that they were not churlish enough "to interfere with any person who went there. One who thus "uses the waste has no right to complain of an excavation he "finds there. He must take the permission with its concomitant "conditions, and, it may be, perils." One recognized exception to this principle is that the occupier must warn the licensee of a danger of which he knows which is in the nature of a trap. "A "trap," said Hamilton L.J.,[4] "involves the idea of concealment "and surprise, of an appearance of safety under circumstances "cloaking a reality of danger." This exception led to the second question put to the jury. If there are no further applicable exceptions the plaintiff fails on the basis that the deceased was a licensee.

The plaintiff submitted that the defendants, although occupiers, were under a general duty to the deceased to take all reasonable steps for his safety having regard to the fact that they had some years before erected the board. If this is right it has always been wrong to say that the plaintiff must take the land as he finds it. He has to take the land on this argument as he would have found it when the occupier went into occupation. In respect of changes made by the occupier the latter's duty to a licensee on this argument is different and greater. Reliance was sought to be placed on *Slater* v. *Clay Cross Co. Ltd.*[5] In that case the plaintiff was a licensee on the defendant's land which included a railway line and a tunnel. The judge found that the accident was due to the negligent driving of a train on the line. The danger did not arise out of the line or the tunnel but out of negligent driving. If an occupier negligently drove a motor-car into a licensee, the principle that the licensee must take the land as he finds it would clearly have no application. Reliance was also placed on a further suggested exception. In *Mourton* v. *Poulter*[6] the plaintiff, a boy of 10, was injured when a tree, which was being cut down, fell. The boy was a trespasser and the defendant was a contractor not the occupier. Scrutton L.J. dealt, however, with the position of an owner[7]: "The liability of an "owner of land to trespassers does not arise where there is on the "land a continuing trap, such as that which was considered in a "case in the Supreme Court of the United States of an innocent "looking pond which contained poisonous matter: *United Zinc "and Chemical Co.* v. *Britt.*[8] There, as the land remains in the "same state, a trespasser must take it as he finds it, and the "owner is not bound to warn him. That, however, is a different "case from the case in which a man does something which makes "a change in the condition of the land, as where he starts a "wheel, fells a tree, or sets off a blast when he knows that people

[4] [1913] 1 K.B. 415.
[5] [1956] 2 Q.B. 264; [1956] 3 W.L.R. 232.
[6] [1930] 2 K.B. 183; 46 T.L.R. 256.
[7] [1930] 2 K.B. 191.
[8] (1922) 258 U.S. 268.

" are standing near. In each of these cases he owes a duty to " these people even though they are trespassers to take care to " give them warning." In an earlier decision referred to in *Brock* v. *Copeland* [9] the same principle was applied to a case in which the defendant having encouraged the public to go through his close was liable when damage was done by a bull which he had later put there without warning (see *Latham* v. *R. Johnson & Nephew Ltd.*[10]; see also *Corby* v. *Hill* [11] and *Excelsior Wire Rope Co. Ltd.* v. *Callan.*[12] Such cases have no application to the present case. The spring-board had been erected for years. The argument, unsupported by authority, fails in principle. The licensee must take the land as he finds it and there could be no logic in drawing a distinction between its state when the occupier went into occupation and its state when changes had been made by him.

It was further submitted that the law as between licensor and licensee had no application because (1) there was no defect in the diving-board as such, and therefore it could not be regarded as a trap as there was no physical defect in the state or condition of the land, and (2) the danger from its use or misuse at low tide was in the sea outside the area occupied.

No authority was cited for the argument that different principles are applicable if the danger arises from the use of a part of the land not defective in itself. In principle it would involve a fine, and, in their Lordships' opinion, an illogical distinction. A trap as defined by Hamilton J. may consist in an invitation to use a non-defective appliance in a way which turns out to be dangerous. If a door opens over a big drop, it may be a trap if it looks as if it led into the next room. A bridge may be a perfectly good bridge though unsuited to carry more than a ton. If so, it may be a trap for a vehicle over a ton if there is no warning.

On the second point, the fact that the concealed danger is that of injury outside the occupied area, whether in the sea or on a highway or in adjacent property on principle would not seem to prevent the application of the rule. In *Latham* v. *R. Johnson & Nephew Ltd.*[13] Farwell L.J. gives as an obvious illustration, the owner of cliffs by the sea who would not be bound to fence them off.

Finally, the plaintiff sought before the Court of Appeal in New Zealand and before their Lordships to base her claim on a submission that the deceased was not a licensee but either an invitee or a person to whom the defendant as a local authority owed a general duty of care. The principle invoked was adopted and applied by the Court of Session in *Plank* v. *Stirling Magistrates.*[14] The pursuer, a child of two-and-a-half, was injured by falling from a chute erected by a local authority in a playground in a public park. The court held that the local authority was liable in damages on

[9] (1794) 1 Esp. 203.
[10] [1913] 1 K.B. 398, 406.
[11] (1858) 4 C.B.(N.S.) 556, 563.
[12] [1930] A.C. 404.
[13] [1913] 1 K.B. 398, 405.
[14] 1956 S.C. 92.

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the ground that the child was an invitee and the danger was an unusual one of which the authority ought to have known. This was the ratio of the majority. Lord Mackintosh based his decision on the ground that the child was there as of right, and therefore entitled to rely on the chute being in a reasonably safe condition.

The question whether in principle persons who are on premises provided by a local authority for the use of the public can or should, apart from authority, be treated as invitees has been discussed in a number of English cases (*Purkis* v. *Walthamstow Borough Council* [15]; *Ellis* v. *Fulham Borough Council* [16]; *Baker* v. *Borough of Bethnal Green* [17]; *Pearson* v. *Lambeth Borough Council.*[18]). Their Lordships were also referred among other cases to *Aiken* v. *Kingborough Corporation,*[19] *Burrum Corporation* v. *Richardson,*[20] and to the American Restatement of the Law of Torts, Vol. II, para. 347.

The Court of Appeal in New Zealand decided that the point not having been taken at the trial could not be taken on appeal. Barrowclough C.J. said [21]: "She," the plaintiff, "accepted that "he was a licensee: and if she had not accepted it no doubt an "issue somewhat differently framed would have been put to the "jury." Adams J., after considering certain cases, said [22]: "Quite apart from the considerations already mentioned, this "present case was pleaded, fought, and put to the jury on "the footing that the deceased was a licensee, and for my part I "do not see how the appellant could now be permitted to place "her case on a different footing."

In *Connecticut Fire Insurance Co.* v. *Kavanagh* [23] Lord Watson, in delivering the judgment of their Lordships' Board, after referring to the raising of points of law in an appellate court on facts admitted and proved beyond controversy said: "But "their Lordship have no hesitation in holding that the course "ought not, in any case, to be followed unless the court is satis-"fied that the evidence upon which they are asked to decide "establishes beyond doubt that the facts, if fully investigated, "would have supported the new plea." A similar statement will be found in Lord Herschell's speech in *Owners of Ship Tasmania and Owners of Freight* v. *Smith.*[24]

In an appeal in a case tried with a jury the appellate court must also consider whether further questions would have been left to the jury, their answers to which remain uncertain. Apart from this principle the matter is one of discretion for the appellate court, and their Lordships would be loth to interfere with the discretion as exercised by the Court of Appeal in the present case.

There is a further consideration referred to by Lord Birkenhead

[15] (1934) 151 L.T. 30, 34.
[16] [1938] 1 K.B. 212, 221; 53 T.L.R. 884; [1937] 3 All E.R. 454.
[17] [1945] 1 All E.R. 135, 139.
[18] [1950] 2 K.B. 353; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682.
[19] (1939) 62 C.L.R.(Aus.) 179.
[20] (1939) 62 C.L.R.(Aus.) 214, 379.
[21] [1957] N.Z.L.R. 39.
[22] Ibid. 66.
[23] [1892] A.C. 473, 480; 8 T.L.R. 752.
[24] (1890) 15 App.Cas. 223, 225.

L.C. in *North Staffordshire Railway Co.* v. *Edge* [25]: "The appellate system in this country," said Lord Birkenhead, "is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below shall be read. The efficiency and the authority of a court of appeal, and especially of a final court of appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case, is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below." These observations should be read subject to the qualification stated in the speeches of Lord Atkinson and Lord Buckmaster in the same case, but they appear to their Lordships to apply with great force to the present appeal. For it is clear that points which would have plainly arisen if this point had been taken remain in doubt. Was this a public park to which the deceased had access as of right? The judge in his summing up on the issue of occupancy says that the defendants had the "right of stopping people going there." The board was not apparently put up on the instructions of the defendants to attract the public but at the request of a swimming club to replace a previous board. If the deceased was to be considered as an invitee one would have expected a question put to the jury as to whether the danger of shallow water at low tide was an unusual danger. It is not certain how this question would have been answered.

The reasons given for dismissing the appeal are in substance those given by the Court of Appeal. Their Lordships thought it right to deal with the issues in some detail having regard to the full arguments addressed to them on each side.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed.

Solicitors: *Arnold, Fooks, Chadwick & Co.; Wray, Smith & Co.*

C. C.

[25] [1920] A.C. 254, 263; 36 T.L.R. 115.

[PRIVY COUNCIL.]

J. C.* 1958 Oct. 2.

MOHAMEDALI JAFFER KARACHIWALLA Appellant;

AND

NOORALLY RATTANSHI RAJAN NANJI and Others . . . . . Respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Mortgage—Redemption and foreclosure—Order for sale—Whether mortgagee entitled to order for sale—Whether proviso for redemption in third mortgage "contract to the contrary"—Indian Transfer of Property Act, 1882 (*Act XIV of* 1882), *s.* 67.

Eastern Africa—Kenya.

By section 67 of the Indian Transfer of Property Act, 1882, as applied to Kenya: "In the absence of a contract to the contrary, "the mortgagee has at any time after the mortgage money has "become due to him and before . . . the mortgage money has been "paid . . . a right to obtain from the court . . . a decree that the "property be sold."

A mortgage deed of October 29, 1951, in respect of leasehold land in Mombasa provided, in effect, that the mortgagor was to pay to the mortgagee interest monthly on sums outstanding on the mortgage, and was to pay off the principal by instalments and at the dates specified in the deed; if the instalments were thus paid the debt would be repaid by June 30, 1968, and, if interest had been paid monthly in the meantime, the security was to be reconveyed by the mortgagee on or after that date. The deed also provided that if the mortgagor failed to observe any of the covenants in the deed the mortgagee was entitled to call in the principal then outstanding and apply to the court to enforce payment.

The mortgagor having defaulted in payment of principal and interest, an order for sale of the security was obtained from the court at the instance of the mortgagee. On appeal, the mortgagor contended that notwithstanding the breaches of covenant the proviso for reconveyance so long as the principal and interest were paid up by June 30, 1968, was a "contract to the contrary" within the meaning of section 67 of the Transfer of Property Act, 1882, and that he was entitled to his security on that date or thereafter if principal and interest had been paid by then:—

Held, that on construction the mortgage deed contained no "contract to the contrary" within the meaning of section 67. The terms of the deed itself negatived the idea that the mortgagee had in all circumstances to wait until June 30, 1968, before enforcing his security. The rights and obligations created by the proviso for reconveyance were only binding so far as they were not rendered incapable of effect—as they were here—by an earlier assertion in the deed of the mortgagee's rights.

Williams v. *Morgan* [1906] 1 Ch. 804 distinguished.

Decision of the Court of Appeal for Eastern Africa affirmed.

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* *Present*: Lord Radcliffe, Lord Tucker and the Rt. Hon. L. M. de Silva.

[Reported by M. B. Kelly, Esq., Barrister-at-Law.]

APPEAL (No. 6 of 1957) from an order of the Court of Appeal for Eastern Africa (Worley P., Briggs and Bacon JJ.A.) (March 27, 1956), dismissing with costs an appeal by the appellant from the judgment of the Supreme Court of Kenya at Mombasa (Mayers J.) (November 11, 1954), and all proceedings subsequent thereto in an action (Civil Case No. 213 of 1953) wherein the respondent, Noorally Rattanshi Rajan Nanji (hereinafter called "the first respondent") was the plaintiff and the appellant and the respondents Ismailia Corporation Ltd. and Karmali Khimji Pradham (hereinafter respectively called "the second respondent" and "the third respondent") were the defendants. The action was begun by a plaint dated August 8, 1953, whereby the first respondent as third mortgagee under an indenture of mortgage (hereinafter called "the third mortgage") dated October 29, 1951, claimed judgment against the appellant for, inter alia: (1) Shs.163,874/94, being Shs.150,000/– principal sum under the third mortgage and Shs.13,874/94 interest thereon as set out in the third mortgage from February 1, 1952, to July 31, 1953; (2) further interest on the said principal sum of Shs.150,000/– at the rate of and in the manner set out in the third mortgage from August 1, 1953, till judgment; (3) order for the sale of the mortgaged premises if the appellant failed to pay the total decretal amount by a date to be fixed by the court; payment to the second respondent and the third respondent of the respective amounts due under their respective mortgages and payment to the first respondent of his decretal amount; (4) personal decree for balance (if any) after the realization of the security in full.

The grounds of the present appeal were twofold: (a) that on the true construction of the third mortgage and of section 67 of the Indian Transfer of Property Act, 1882 (as applied to Kenya), the first respondent was not entitled to an order for the sale of the mortgaged property; and (b) that, even if he was, the order dated November 15, 1954, the preliminary decree for sale and the final decree for sale hereinafter mentioned were not in the form prescribed by the relevant provisions of the Indian Transfer of Property Act, 1882 (as applied to Kenya).

The appellant was the lessee of three parcels of land situated on Mombasa Island. By an indenture dated October 29, 1951, the appellant mortgaged the three parcels in favour of the second respondent to secure repayment of the sum of Shs.84,000 together with interest thereon; by a second indenture of the same date he mortgaged the same three parcels, subject to the first mortgage, in favour of the assignor of the third respondent to secure repayment of a sum of Shs.21,623 together with interest thereon. By the third mortgage he mortgaged the same three parcels in favour of the first respondent, subject to the first and second mortgages, to secure repayment of the sum of Shs.150,000 together with interest thereon at the rate of 4 per cent. on the

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first Shs.100,000, 9 per cent. on the second Shs.25,000 and 12 per cent. on the third Shs.25,000.

The covenants in the third mortgage so far as relevant to this appeal were as follows: First, after recitals, the mortgagor (i.e., the appellant) covenanted to pay to the mortgagee (i.e., the first respondent) the sum of Shs.150,000 on June 30, 1968, together with interest computed as therein provided and he covenanted to pay such interest at the end of every month as it accrued due and payable. Then followed an assignment by the mortgagor to the mortgagee of the three parcels of land for the residues of their respective terms of years (except the last two days of each term) together with buildings then in course of erection and to be erected thereon. The mortgagor further covenanted with the mortgagee: "(b) During the term "of this mortgage and so long as any moneys remain due and "owing under these presents the mortgagor will pay all the "amounts whether for principal interest or otherwise due or to "fall due under the first and second mortgages . . . and also "pay the ground rent and all municipal rates and taxes and "all outgoings in respect thereof regularly. (d) To insure and "keep insured all buildings situate and to be erected on the land; ". . . (e) Should the mortgagor make any default in payment "of the ground rents, municipal rates and taxes, insurance and "payments of premium or premia in respect thereof or should "he fail to pay interest regularly and punctually to the mortgagee "under the first and second mortgages or should he fail to "pay the interest due on the principal sum or sums advanced "regularly as hereinbefore provided or should he fail to carry "out any of the covenants and conditions and agreements herein "contained then in any one of such cases the mortgagee shall be "at liberty to demand the repayment of the principal sum to-"gether with all interest due thereon notwithstanding the time "for repayment thereof hereinbefore provided and shall be en-"titled to recover the same through a court of law: Provided "always that the mortgagee shall not enforce his right to claim "and recover the whole principal sum in event of any of the "above defaults until after January 1, 1952, and even after "the said date until after a five weeks previous written notice "is first given by the mortgagee to the mortgagor demanding "the compliance of any default or breach as aforesaid. . . . "(f) He the mortgagor agrees that he will repay the sum of "Shs.150,000 (Shillings one hundred and fifty thousand) to be "advanced hereunder by twenty-five half yearly instalments of "Shs.5,000 (Shillings five thousand) the first of such half "yearly instalments to be paid on June 30, 1952, and the "remaining twenty-four at the end of every six months and "thereafter the balance by eight half yearly instalments the "first seven instalments of Shs.3,000/– (Shillings three thousand) "each and the eighth instalment of Shs.4,000 (Shillings four

" thousand) thus paying off the whole amount by June 30, 1968, " as hereinbefore provided. . . ."

The provision for redemption in the third mortgage was as follows: " (h) The mortgagee hereby covenants with the mort- " gagor that if the mortgagor shall repay the total principal sum " advanced under these presents together with interest thereon " due as hereinbefore provided by June 30, 1968, the mortgagee " will at any time thereafter after the expiry of the stipulated " date at the request and cost of the mortgagor reassign and " surrender the lands and all buildings to the mortgagor as he " the mortgagor may direct."

The appellant made default in payment of the principal sums and interest due under the first and second mortgages and failed to pay the ground rent and municipal rates in respect of the mortgage property and also failed to pay the requisite insurance premium and the instalments and interest payable under clause (f) of the third mortgage, and the first respondent on July 2, 1953, sent him a notice under clause (e) requiring him to rectify such defaults within five weeks, failing which the first respondent would take action to recover the principal sum and interest due under the third mortgage. The appellant did not comply with the notice.

The trial of the action took place at Mombasa on July 29 and 30, 1954, and August 23 and 24, 1954, before Henry Mayers J. who, on November 11, 1954, delivered judgment in favour of the first respondent.

By an order dated November 15, 1954, Henry Mayers J. directed that an account be taken by the registrar and the amounts found due to the first, second and third respondents respectively be certified on or before December 15, 1954; that the appellant should have three months from the date on which such account was delivered within which to pay all sums as might be found due upon such account; and in default of such payment within such period that a preliminary decree for the sale of the mortgaged property free from prior mortgages should be issued, followed by a final decree against the appellant for the amount (if any) by which the sum realised upon such sale was insufficient to discharge the appellant's liability to the first respondent in full.

By a preliminary decree for sale dated January 21, 1955, after declaring that the several amounts therein mentioned were due to the first, second and third respondents respectively under their respective mortgages, it was decreed as follows: " (1) That " if the defendant No. 1 pays into court the three amounts so " declared due on or before the said 15th day of March, 1955, the " plaintiff and the defendants Nos. 2 and 3 shall deliver up to " the defendant No. 1 or to such person as he appoints all " documents in their possession or power relating to the proper- " ties under the said charges, . . . (2) That if such payment " is not made on or before the said 15th day of March, 1955, the

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"properties charged or a sufficient part thereof be sold and that "the proceeds of the sale (after defraying thereout the expenses "of the sale) be paid into court and applied in payment firstly "of what is declared due to the defendant No. 2 as aforesaid, "secondly in payment of what is declared due to the defendant "No. 3 as aforesaid and thirdly of what is declared due to the "plaintiff as aforesaid, together with subsequent interest and "subsequent costs. . . . (3) That if the net proceeds of the "sale are insufficient to pay such amounts and such subsequent "interest and costs in full, a Personal Decree be issued against "the defendant No. 1 in favour of the defendant No. 2, defen-"dant No. 3 and or the plaintiff as the case may be, for the "amount of the balance." By a final decree for sale dated May 20, 1955, after reciting that the payment directed by the preliminary decree for sale had not been made by the appellant or any person on his behalf, it was ordered that (1) the properties charged in favour of the second, third and first respondents should be sold, (2) the moneys realized by such sale should be paid into court and should be duly applied in payment of what was due to the second, third and first respondents as therein provided, and (3) if the net proceeds of sale were insufficient to pay the sums therein mentioned the second, third or first respondents as the case might be should be at liberty to apply for a personal decree for the amount of the balance.

The appellant appealed to the Court of Appeal for Eastern Africa against the whole of the decision of Henry Mayers J. The appeal was dismissed with costs.

1958. July 14, 15. *H. E. Francis* for the appellant.
Arthur Bagnall for the respondents.

The following cases were referred to in argument: *Forbes* v. *Gitt* [1]; *Edwards* v. *Martin* [2]; *Sue* v. *Korishi*.[3]

October 2. The judgment of their Lordships was delivered by LORD RADCLIFFE. This appeal from the Court of Appeal for Eastern Africa relates to proceedings instituted in the Supreme Court of Kenya at Mombasa by the first respondent to enforce his security under a mortgage of certain land on the Island of Mombasa which was granted to him by the appellant. The second and third respondents hold prior mortgages of the same property, so that the mortgage now in question is a third mortgage. The Supreme Court gave judgment in favour of the first respondent on November 11, 1954, upholding the validity of his mortgage. This judgment was followed by three orders in the same court dated respectively November 15, 1954, January 21, 1955, and May 20, 1955, the effect of which was to pass a final decree for sale of the

[1] [1922] 1 A.C. 256.
[2] 25 L.J.R. 284.
[3] 27 Indian App. 98.

mortgaged property and for satisfaction out of the proceeds of sale of the sums found due to the respective mortgagees on their several mortgages, the mortgagees being given liberty to apply for personal decrees against their mortgagor for payment of any balances due to them, if the proceeds of sale proved insufficient to satisfy them in full.

An appeal against these orders was dismissed by the Court of Appeal on March 27, 1956. The mortgagor's main point in his argument before this Board has been to the effect that having regard to the provisions of section 67 of the Indian Transfer of Property Act, 1882, as applied to Kenya, and to the terms of the third mortgage, the first respondent was not entitled to obtain an order for sale from the court. This point was not raised during the hearing of the case in the Supreme Court, which was concerned with other issues affecting the enforceability of the mortgage, but was argued, though unsuccessfully, before the Court of Appeal. The mortgagor has also raised two points, essentially procedural, which impugn in some respects the form of the Supreme Court Order dated January 21, 1955, which was a preliminary decree for sale. These points were raised neither before that court nor before the Court of Appeal. For the reasons which will be mentioned more fully later it is not the intention of their Lordships to give any decision upon these procedural points which in the circumstances are not open to the appellant.

The appellant's main argument is that the proviso for redemption in the third mortgage amounted to an agreement that so long as the mortgage money and interest were paid up by June 30, 1968, the mortgagor should be entitled to the return of his security on that date or thereafter. It is not in dispute that the monthly interest stipulated for by the mortgage had fallen into arrear before proceedings were commenced or that, by virtue of this and notice given in respect of it, the principal moneys due on the mortgage had become immediately repayable: but the mortgage is so drawn, it is said, that nevertheless the undertaking for reconveyance on or after June 30, 1968, remains in force so that until that date the mortgagor has a continuing chance of recovering his property by tendering the full amount of principal and interest contracted for. Such an undertaking then—and, if the premise is right the conclusion may well follow—amounts to a "contract to the contrary" within the meaning of section 67 of the Transfer of Property Act, 1882, and therefore precludes the possibility of a sale or foreclosure under the process of the court before that date.

Section 67 provides: "In the absence of a contract to the "contrary, the mortgagee has at any time after the mortgage "money has become due to him and before a decree has been "made for the redemption of the mortgaged property, or the "mortgage money has been paid or deposited as hereinafter "provided, a right to obtain from the court a decree that the

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" mortgagor shall be absolutely debarred of his right to redeem " the property, or a decree that the property be sold."

To assess the validity of this contention it is necessary to decide what the contractual scheme of the third mortgage amounts to. It is a somewhat complicated document which is not drawn with any great nicety of draftsmanship. But for all that there is no need to make any mystery about its effect or the expressed intentions of the parties. Properly understood, the document appears to their Lordships to afford no support to the appellant's highly improbable construction. It is best to set out a summary of the main provisions of the mortgage, as they affect this point, in the order in which they appear in the deed and then to say what, read together, they amount to as a contractual scheme.

(i) The mortgage was by indenture dated October 29, 1951, and was made between the appellant as mortgagor and the first respondent as mortgagee.

(ii) The deed recited first and second prior mortgages of the same date, and stated that the consideration for the mortgage was the sums of 130,000 shillings advanced and 20,000 more shillings to be advanced to the mortgagor by the mortgagee upon the security of the intended third mortgage.

(iii) The mortgagor covenanted in consideration of the sums of 130,000 shillings lent and 20,000 shillings to be lent on November, 15, 1951, to pay to the mortgagee the sum of 150,000 shillings on June 30, 1968, together with interest thereon at varying rates on different sectors of the total sum, all such interest to " be " paid . . . at the end of every month as it accrues due and " becomes payable."

(iv) Certain leasehold interests in land on the Island of Mombasa were assigned to the mortgagee as security for the mortgage, subject to the two prior mortgages.

(v) The mortgagor entered into a number of covenants with the mortgagee, among them covenants to complete buildings on the mortgaged property; to pay all sums becoming due either for principal or interest on the prior mortgages; to observe the terms of the head leases of the land mortgaged and to pay ground rent, rates, taxes and outgoings; to keep the buildings on the site insured and to pay the premiums required.

(vi) Three of the mortgagor's covenants were in the following terms:

" (*e*) Should the mortgagor make any default in payment of " the ground rents, municipal rates and taxes, insurance and " payments of premium or premia in respect thereof or should " he fail to pay interest regularly and punctually to the " mortgagee under the first and second mortgages or should he " fail to pay the interest due on the principal sum or sums " advanced regularly as hereinbefore provided or should he fail " to carry out any of the covenants and conditions and agree- " ments herein contained then in any one of such cases the " mortgagee shall be at liberty to demand the repayment of the

" principal sum together with all interest due thereon notwith-
" standing the time for repayment thereof hereinbefore provided
" and shall be entitled to recover the same through a court of law
" provided always that the mortgagee shall not enforce his
" right to claim and recover the whole principal sum in event of
" any of the above defaults until after January 1, 1952, and even
" after the said date until after a five-week previous written
" notice is first given by the mortgagee to the mortgagor demand-
" ing the compliance of any default or breach as aforesaid AND
" PROVIDED ALWAYS THAT the mortgagor shall not permit
" any increase of amount under either or both of the two previous
" mortgagees in respect of interest, premium ground rents, muni-
" cipal rates or in any other way whatsoever AND should the
" mortgagor permit such an increase after January 1, 1952, the
" mortgagee shall also be entitled if after a notice in writing of
" five weeks any of such amounts are not paid up to claim the
" whole amount of loan and interest forthwith notwithstanding
" the period of repayment.

" (*f*) He the mortgagor agrees that he will repay the sum of
" Shs.150,000/– . . . to be advanced hereunder by twenty-five half
" yearly instalments of Shs.5,000/– . . . the first of such half
" yearly instalments to be paid on June 30, 1952, and the remain-
" ing twenty-four at the end of every six months and thereafter
" the balance by eight half yearly instalments the first seven
" instalments of Shs.3,000/– . . . each and the eighth instalment
" of Shs.4,000/– . . . thus paying off the whole amount by June
" 30, 1968, as hereinbefore provided and from such half yearly
" payments the mortgagee shall accept Shs.3,000/– . . . towards
" the reduction of the sum of Shs.100,000/– and Shs.2,000/– to-
" wards the reduction of the first Shs.25,000/– and after the first
" Shs.25,000/– has been paid of the subsequent payment of
" Shs.2,000/– towards the reduction of the second Shs.25,000/–
" and after such payments interest will run on the balance or
" balances due in respect of the respective sums. Provided always
" and it is hereby agreed that the mortgagee shall appropriate the
" first payment or payments towards the amount or amounts
" expended by him the mortgagee for insurance, interest due and
" other outgoings and only after satisfaction in full of all such
" payments the payments will be applied towards the reduction
" of the principal sum or sums.

" (*g*) The mortgagor shall be entitled to make payment of any
" amount but not less than Shs.5,000/– at any time other than
" the instalments hereinabove stated towards the amount due
" under this mortgage and the same shall be appropriated by the
" mortgagee as stated in clause (*f*) hereof."

(vii) Finally, the proviso for redemption took the form of a covenant by the mortgagee with the mortgagor as follows:

" . . . if the mortgagor shall repay the total principal sum
" advanced under these presents together with interest thereon
" due as hereinbefore provided by June 30, 1968, the mortgagee

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" will at any time thereafter after the expiry of the stipulated " date at the request and cost of the mortgagor reassign and " surrender the lands and all buildings to the mortgagor as he the " mortgagor may direct."

There are. of course, certain parts of this scheme which are not capable of being reconciled with each other in literal terms. If the mortgagor was under obligation to repay the whole 150,000 shillings on June 30, 1968, he could not at the same time be required or entitled to pay off parts of that sum by instalments during the intervening period. If the principal money became immediately payable in default of interest, etc., under clause (e), the mortgagor could not continue thereafter to be under a simultaneous liability to pay up either the principal sum on June 30, 1968, or instalments of it at fixed dates in the interim. A similar difficulty on the wording of the document would arise if the mortgagor exercised his power of anticipating mortgage payments under clause (g).

But these difficulties are not so great as to call for any such desperate expedient as rejection of one or more parts of the deed on the ground of inconsistency. On the contrary, their Lordships are of opinion that the scheme agreed upon was easily intelligible from the document read as a whole and its total effect can be summarised under the following heads: (1) The mortgagor was to pay interest monthly on sums outstanding on the mortgage, to pay off the principal by the instalments and at the dates specified in clause (f) and, if the instalments were paid off, according to that schedule, thus wiping out the debt by June 30, 1968, and interest were paid monthly in the meantime, the security was to be reconveyed on or after that date. (2) On the other hand, if the mortgagor failed to observe any of his various covenants and obligations under the mortgage deed, including his obligation to pay instalments and current interest, the mortgagee was entitled from January 1, 1952, to give five weeks' notice calling in the whole principal sum then outstanding and to resort to a court of law to enforce the payment by any form of process which it might be within the power of the court to grant. So construed, the mortgage deed contains no " contract " to the contrary " within the meaning of section 67. The appellant's argument seeks to extract such a contract from the proviso for reconveyance by interpreting that proviso as meaning that, no matter to what extent the scheme of payment provided by the earlier clauses or the covenants for protecting the value of the security had broken down, so that the enforcement provisions of clause (e) had had to be brought into play, nevertheless the mortgagor was still entitled to have the security retained, unsold or unforeclosed, until June, 1968, on the chance that he might turn up by that date with a full tender of principal and interest owing. No doubt there can be cases in which, either by accident or design, a proviso for redemption or reconveyance may express some such arrangement between mortgagor and

mortgagee. *Williams* v. *Morgan*,[1] which was referred to in argument, is an instance of such a case. But this mortgage is not one of them. It is sufficient to mention two reasons for that conclusion. In *Williams* v. *Morgan* the condition upon which the mortgagee was to return to the mortgagor his pledged estate had not been broken. The obligation stood. Here the condition has been broken, since the proviso requires that interest on the mortgage money should have been paid " as hereinbefore " provided," and the foregoing provisions of the deed call for interest to be paid monthly and not otherwise. The obligation does not therefore stand. Secondly, the mortgage in *Williams* v. *Morgan* contained no stipulation comparable with clause (e) of the present deed. Clause (e) explicitly negatives the idea that the mortgagee is in all circumstances to wait until June, 1968, before enforcing his security. There is no warrant for cutting down the meaning of such phrases as " recover the same through " a court of law " and " enforce his right to claim and recover " . . . " to extend only to an action for personal debt. But, if the words of clause (e) are accorded their natural meaning and the proviso for reconveyance which follows is read in the light of them, it must result that the rights and obligations created by that proviso are only binding so far as they are not rendered incapable of effect by an earlier assertion of the mortgagee's rights under clause (e).

Their Lordships will now notice the procedural points which were raised by the appellant in argument before them. It is desirable that they should be attended to even though no decision is given upon them, since they are not insubstantial and it is possible that they indicate some looseness of practice in the courts in Kenya to which the attention of the judicial authorities there might usefully be directed. The first point made is that the order of the Supreme Court dated November 15, 1954, and the two consequent decrees for sale were erroneous in that the sale was ordered to take place if the mortgagor did not bring into court within the time specified the sums of money due on all three outstanding mortgages: whereas, it is argued, the condition required of him should have been limited to his bringing into court the money due on the third mortgage only. The third mortgagee was the sole plaintiff in the action, the sole party explicitly claiming relief, and the contingent sale decreed by the court for the purpose of affording that relief should not have been made dependent upon compliance with a condition the effect of which was to secure payment in full to the first and second mortgagees as well, parties who were asking for no relief in the action. The form of order for foreclosure or sale which is prescribed by sections 86 and 88 of the Transfer of Property Act, 1882, does not envisage that the preliminary decree will provide for the mortgagor bringing into court anything more than

[1] [1906] 1 Ch. 804.

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the sum due to the mortgagee who is the plaintiff seeking relief, and the court, it is said, had no power to extend the content of such an order by requiring security for the sums due on the first and second mortgages as well.

To decide upon the validity of this argument would require a careful review of the regulations and practice of the Kenya courts. If the matter were being dealt with under English practice, there would be force in it, because the prior mortgagees would not be likely or necessary parties to the third mortgagee's action against the mortgagor and the sale of that mortgagee's security could take place without affecting their rights, which would have priority over the rights of a purchaser of the property sold. But it does not follow that the position was the same in Kenya. In this suit the prior mortgagees were in fact joined as defendants. It may even be that, having regard to section 85 of the Transfer of Property Act, 1882, they must be regarded as necessary parties. Whether they were so or not depends on the meaning to be attributed to the words "property comprised in a mortgage" in that section. In the event neither of these mortgagees put in a defence: their counsel's submission, as recorded by the trial judge, was, "If plaintiff succeeds, provision should be made for "prior rights of first and second mortgagees. Instructions are "to support Patel" (counsel for the plaintiff) "in all his argu-"ments." Presumably they must be taken as consenting that the sale that was ordered should be made free from their securities within the meaning of section 96 of the Act. If so, it would follow necessarily that provision would have to be made for an account of the sums respectively due to them and for payment of these sums out of the proceeds.

The appellant maintained that in raising this point about the form of the orders he was raising a point of jurisdiction before the Board to which attention must be given as of right. Their Lordships do not accept this view at all. The most that can be said against the orders is that in one respect they may have subjected the mortgagor to a condition more burdensome than that which in law could be required of him. But every order that is defective in form in that sense is not an order made without jurisdiction, since an order may be wrong without its being beyond the capacity of the court to make it. Whether in this particular case the right forms were gone through or not, it seems plain that, with all the parties before the court and the prior mortgagees explicitly asking that their prior rights should be protected, they either were treated as, or could have put themselves in the position of being, additional plaintiffs claiming relief against the mortgagor. If he had made at the time the objections which he has sought to raise now, any necessary adjustment of parties or pleadings could have been made. In the circumstances their Lordships are of opinion that he must abide by the result and that no question of any want of jurisdiction arises.

The second point of procedure raised by the appellant requires only brief notice, since it appears that it is still open to him to take it, if he wishes to, in the courts of Kenya. The preliminary decree for sale dated January 21, 1955, contained among other directions provisional personal decrees against the appellant in favour of the three mortgagees for the amount of any balance found due to them respectively and not provided for out of the proceeds of sale of the mortgaged property. The appellant draws attention to the fact that under rule 21 of the Kenya Rules of Court (Mortgage Suits) no personal decree may issue against a mortgagor for a balance of money payable to any party not a plaintiff in the suit.

This point is another one which, if valid, could probably have been disposed of in the course of proceedings by amendment. It should have been taken at the time of the drawing up of the Preliminary Decree. It was not, nor was any reference made to it before the Court of Appeal: and it is now of contingent importance only since the final decrees, which for this purpose superseded the preliminary decree, did not pass any personal decrees for payment but merely directed that, if the net proceeds of the sale then ordered were insufficient to pay the amounts found due and subsequent interest and costs in full, the several mortgagees should be at liberty to apply for personal decrees for the amount of the balance. If any such application is made by either of the respondent mortgagees, the appellant can put forward his point that, as defendants in the suit, they cannot as such be granted a personal decree against their mortgagor.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs.

Appeal dismissed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandy K.; Waltons & Co.*

[QUEEN'S BENCH DIVISION.]

RANDS *v.* OLDROYD.

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Oct. 15.

Lord Parker C.J., Cassels and Streatfeild JJ.

Local Government — Meeting of local authority — Voting — Pecuniary interest—Member of local authority director of local building firm—Whether permitted to vote on matters relating to tenders—Whether mere right to tender in future constitutes direct pecuniary interest—"Pecuniary interest in any contract . . . or other matter"—Local Government Act, 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 76 (1).

The defendant was managing director of and held a controlling interest in a building company and was also a member of the local council. The company had taken part in various building contracts for the council, but had not tendered for any such contracts since

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1954. In 1956, in view of his position on the council, the defendant decided that the company would not tender in future for any building contracts for the council. In 1957, at a meeting of the council, a motion was proposed that, where it was required that tenders should be obtained, the borough engineer should submit a tender on behalf of his department, and where necessary, the direct labour force should be increased to implement that policy. The motion was subsequently amended by deleting that part referring to the increase of the direct labour force, and the defendant voted in favour of the motion as amended. On an information preferred against the defendant under section 76 of the Local Government Act, 1933 *:—

Held, that no limitation should be put on the words "any other "matter" in section 76 (1); and that, although the defendant's company did not have any pecuniary interest "in any contract or "proposed contract" within that subsection, it had a direct pecuniary interest in an "other matter," namely, that if the original motion was carried the competition of the borough engineer might prevent the company, if they tendered, from obtaining a contract; although the company had decided not to tender in future, it was always open to it to reverse that policy, accordingly, its interest was "direct" and not too remote and the defendant, as its managing director, had an indirect pecuniary interest in the matter under discussion and by voting was guilty of an offence.

Brown v. *Director of Public Prosecutions* [1956] 2 Q.B. 369; [1956] 2 W.L.R. 1087; [1956] 2 All E.R. 189 considered.

CASE STATED by the Ely justices, sitting at Wisbech.

On February 5, 1958, an information was laid by Donald Oldroyd, detective inspector, on behalf of the Director of Public Prosecutions alleging that the defendant, Leslie Harry Rands, on September 27, 1957, being a member of the Wisbech Borough Council and then having an indirect pecuniary interest in a matter under consideration at a meeting of the council, namely, the submission of tenders by the borough engineer for certain contracts, was, contrary to section 76 of the Local Government Act, 1933, present at the meeting and took part in the discussion.

The justices found the following facts:

The defendant was managing director of, and holder of 200 of

* Local Government Act, 1933, s. 76: "(1) If a member of a local "authority has any pecuniary interest, direct or indirect, in any "contract or proposed contract or "other matter, and is present at a "meeting of the local authority at "which the contract or other matter "is the subject of consideration, he "shall at the meeting, as soon as "practicable after the commencement "thereof, disclose the fact, and shall "not take part in the consideration or "discussion of, or vote on any question with respect to, the contract or "other matter: Provided that this "section shall not apply to an interest "in a contract or other matter which "a member may have as a ratepayer "or inhabitant of the area, or as an "ordinary consumer of gas, electricity "or water, or to an interest in any "matter relating to the terms on "which the right to participate in any "service, including the supply of "goods, is offered to the public. "(2) For the purposes of this section "a person shall (subject as hereafter in this subsection provided) be "treated as having indirectly a pecuniary interest in a contract or other "matter, if—(*a*) he or any nominee of "his is a member of a company or "other body with which the contract "is made or is proposed to be made or "which has a direct pecuniary interest "in the other matter under consideration; . . ."

the 300 £10 ordinary shares in Henry Rands & Son Ltd., a private limited liability company carrying on business as builders in Wisbech. He was elected to the Wisbech Borough Council in 1950. Up till 1945 the company had taken part in nine contracts for building work for the council. The company's last contract for building work for the council was made in June, 1954, and the company's last tender (which was not accepted) for building work for the council was made in August, 1954. Although there had been approximately 15 building contracts put out for tender by the council since August, 1954, the company had not tendered for any such contracts. In May, 1956, when the defendant became vice-chairman of the housing and town planning committee of the council, he decided that in view of his holding that position, the company would not tender in future for any building contracts for the council.

The rules of the council with respect to contracts were set out in the council's standing orders, and in particular, provided that no contract exceeding £500 in value should be made unless either public notice had been given to enable people to tender, or invitations to tender had been sent out to selected persons. In July, 1957, a motion was proposed: "That where it is required that "tenders shall be obtained in compliance with standing order 3 "concerning contracts, the borough engineer shall submit a tender "on behalf of his department for any contract that he feels may "be within the scope of that department, and where necessary, "the direct labour force be increased in order to implement this "policy." The meeting was adjourned and the matter came before the general purposes committee, who reported that they did not think it desirable to increase the direct labour force. Accordingly, when the matter again came before the council in September, 1957, there was a suggestion that the motion should be amended by allowing the borough engineer to tender, as he had always done, but to delete the words which would enable him to increase the direct labour force. Several members expressed their differing opinions and the defendant spoke in favour of the motion as amended by the general purposes committee.

By reason of the fact that it was a local company and the nature of its business, the company was in a position to tender for building work for the council, and to tender for such work in the future if it should so desire.

It was contended by the prosecution that the company, by reason of its location and history and the nature of its business, was in an especially favourable position to submit tenders for building work for the council if it so wished and, therefore, had a direct pecuniary interest in the matter under discussion within the meaning of section 76 (1) of the Local Government Act, 1933, and that the defendant had an indirect pecuniary interest in the motion because he was managing director and a shareholder of the company.

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It was contended by the defendant that it was not the intention, or the effect, of section 76 of the Local Government Act, 1933, that a member of a local authority should be debarred from taking part in the discussion of a question under consideration by the authority because the adoption of one or other of the alternative courses proposed might in the future result in financial benefit or disadvantage to that member. If that were so, local authorities would often be deprived of the views of members who alone possessed expert or technical knowledge of the question under discussion. Further, the expression " or other matter " in subsection (1) of section 76 was to be construed ejusdem generis with " contract or proposed contract," or was at any rate to be construed as meaning a specific transaction or matter which, like a contract or proposed contract, gave rise to rights and liabilities. Appropriate examples would be a town planning application or a compulsory purchase order affecting the member's land. In the present case, the discussion in the council did not relate to any such " matter," but only to a question of general policy in which no existing rights or liabilities were affected. The word " interest " in subsection (1) referred to such a relation between the member of the local authority and the " contract or proposed " contract or other matter " as gave the member some legal or equitable right arising out of or in connexion with the contract or other matter. In the present case, the defendant had no such interest. The expression " has any pecuniary interest " in subsection (1) meant that the defendant must have a present and existing pecuniary interest and not one which might arise at some future date. In the present case the defendant had no such interest. The company had no direct interest, and the defendant had therefore no indirect interest, in any matter within the meaning of subsection (1), since the only suggestion made by the prosecutor was that the company might in future tender for a council house contract or contracts, and that if (in accordance with the motion as unamended) the borough engineer were obliged to tender for every such contract and enabled to recruit a labour force sufficient to carry it out the company would, if they tendered, be faced with an additional competitive tender. The company had, in any event, no direct interest, and the defendant had therefore no indirect interest in any matter within the meaning of subsection (1).

The justices were of the opinion that the defendant was sincere in his statement that his company did not intend to tender for any further council work while he held office in the council, and that he had acted throughout in an open and honourable manner, but, in the absence of any positive statement or other steps by the defendant prior to the proceedings before them, the company could have tendered at any time. In such circumstances, they were of opinion that there had been a breach of section 76 of the Local Government Act, 1933, but that in all the circumstances it

was proper to grant the defendant an absolute discharge. The defendant appealed.

Roy Wilson Q.C. and *Gerald Kidner* for the defendant.
S. A. Morton for the prosecutor.

The following cases were cited in argument: *Brown* v. *Director of Public Prosecutions* †; *England* v. *Ingles* ‡; *Nutton* v. *Wilson* §; *Lapish* v. *Braithwaite*.‖

LORD PARKER C.J. stated the facts, referred to section 76 (1) and (2) of the Local Government Act, 1933, and continued: It is clear that the member of the council concerned, namely, the defendant, can only have an indirect pecuniary interest in this case if the company itself has a direct pecuniary interest. Therefore, one can limit the matter to simply this: Did Rands & Son Ltd. in the circumstances of this case have a direct pecuniary interest in any contract or proposed contract or other matter which was the subject of discussion at the meeting? There is no question here of any contract or proposed contract. If the company had a direct pecuniary interest it was because they had a direct pecuniary interest in an "other matter," and what is said quite shortly is this, that the matter under discussion was a matter which, to put it generally, seriously affected the company in a pecuniary way in that, if the original motion was carried, the competition of the borough engineer might well be such as to prevent the company, if they tendered, from ever getting a contract. It is said that, accordingly, they had a financial interest and a direct financial interest in the matter to be discussed, and which was discussed at that meeting.

The all-important matter is to consider the mischief aimed at by section 76. One can say it is obvious, and indeed it is. It was put by Lord Esher M.R. in *Nutton* v. *Wilson*,[1] a case considering a rather similar provision in the Public Health Act, 1875, in these words: "I adhere to what I have before said with "regard to provisions of this kind. They are intended to prevent "the members of local boards, which may have occasion to enter "into contracts, from being exposed to temptation, or even to "the semblance of temptation." Lindley L.J. in the same case said[2]: "To interpret words of this kind, which have no very "definite meaning, and which perhaps were purposely employed "for that very reason, we must look at the object to be attained. "The object obviously was to prevent the conflict between "interest and duty that might otherwise inevitably arise."

That is clearly the object of section 76 of the Local Government Act, 1933, and whereas, of course, a consideration of the

† [1956] 2 Q.B. 369; [1956] 2 W.L.R. 1087; [1956] 2 All E.R. 189.
‡ [1920] 2 K.B. 636.
§ (1889) 22 Q.B.D. 744.
‖ [1926] A.C. 275.
[1] (1889) 22 Q.B.D. 744, 747.
[2] Ibid. 748.

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mischief aimed at does not enable the court to construe the words in a wider sense than they appear, it at least means that the court would not be acute to cut down words otherwise wide merely because this was a penal statute. Mr. Wilson in his very able argument has contended that, nevertheless, the words "having a "direct pecuniary interest in any contract or proposed contract "or other matter," are not as wide, properly construed, as one would otherwise think. He relies in particular on the words "or "other matter," and he says that whether one looks at the matter as a case of ejusdem generis or of noscitur a sociis, at any rate "other matter" must be something confined to what he would say was a specific transaction, and not a matter of what might be said to be general policy. Apart from relying on that principle he also points out that in the Municipal Corporations Act, 1882, which was repealed by the Local Government Act, 1933, the corresponding section, section 22 (3), was in these terms: "A member of the council shall not vote or take part in "the discussion of any matter before the council, or a committee, "in which he has, directly or indirectly, by himself or by his "partner, any pecuniary interest." He points out that that is quite general; there is no reference there to a specific contract or proposed contract, and he invites the court to say that section 76 was intended to be a limitation on what heretofore had been a very general provision. I find it impossible to give any satisfactory narrower meaning, even if I were so minded, to those words "any contract or proposed contract or other matter." I do not propose to go through the number of illustrations which have been canvassed in this court, but the more one does consider the matter the more difficult and impossible it is to cut down those words "or other matter" to something which was definable and which was a limitation on what appear to be general words. Bearing in mind the mischief aimed at by this Act, I do not think those words are to be read in other than a very general way, and I see no ground for introducing a limitation which, as I said, is one which cannot satisfactorily be defined.

Mr. Wilson pointed out that if you construe section 76 in a very wide way you may make business at council meetings impossible, it may stultify the whole proceedings, and that he invokes as another ground for cutting down the general meaning of those words. I quite appreciate the force of that argument, but I think the limitation to be found in section 76 is not in regard to the words "in any contract or proposed contract or other "matter," but in the consideration of whether the person under consideration—the company here—had a direct pecuniary interest. I think the limitation is to be found in that word "direct" as opposed to a pecuniary interest which is too remote. In the present case I am satisfied that the company did have a direct pecuniary interest, and that that interest was not too remote to bring them within the words of the section. All these cases, of course, must be determined ultimately on their particular facts,

but I think some help is to be gained by a consideration of one of the only two cases which have come before this court on this question, namely, *Brown* v. *Director of Public Prosecutions*.[3] The question there to be debated was as to lodgers' allowances to be paid by tenants of council houses, and three of the councillors who were on the council considering this matter were in fact tenants of council houses, albeit they had not any lodgers. The court also went on to consider and contrast the position of those councillors who had not as yet got council houses, but might at some time apply for them. The court were clearly of opinion that those councillors who were already tenants, albeit they did not have lodgers as yet and might never have lodgers, did have a pecuniary interest in the contract or proposed contract of tenancy. The court went on to contrast the position of those councillors who might become tenants of a council house in the future but who as yet had not become tenants. It is enough, I think, to refer to two passages, first, in the judgment of Lord Goddard C.J., where he said[4]: "I think that Parliament has laid down "that on any matter in which a member of a local authority has "a pecuniary interest—and he undoubtedly has a pecuniary "interest if he is paying rent for a house owned by the council— "he should not vote at all. . . ." A little further on he refers to what might be thought to be anomalies; he said[5]: "It is "true that anomalies may occur—if they are really anomalies, "though I do not think they are—for instance, councillors might "vote on those matters knowing, perhaps, that in a few months "time they might themselves be the occupiers of council houses "and pay rent to the council. One cannot deal with every point "which arises, but if a person occupies a council house, I think "that he is debarred by the terms of section 76 from voting." Again, Donovan J. in his judgment[6] after stating: "The object "of section 76 (1) is clearly to prevent councillors from voting on "a matter which may affect their own pockets and which may "therefore affect their judgment," goes on to say: "I am "referring to the three who had not taken any lodgers or sublet at "the time, but who each had a council house which was a poten- "tial income-producing asset. Their case is different from a "councillor who merely had a hope of obtaining such a house in "the future." The facts there were quite different. What was being considered was a contract of tenancy, but I think the relevance of it is that in laying down the limitation in the case of councillors who had not yet got tenancies, the court were making the very point I am trying to make, namely, that one has to consider whether the pecuniary interest was direct or remote, and they were really saying that the interest of councillors who had not a council house was too remote whereas those that did have a council house came within the words of the section. In the present case the

[3] [1956] 2 Q.B. 369; [1956] 2 W.L.R. 1087; [1956] 2 All E.R. 189.
[4] [1956] 2 Q.B. 369, 376.
[5] Ibid. 377.
[6] Ibid. 378.

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company clearly had a direct pecuniary interest in the matter under discussion.

Finally, I should say this: The justices found that not only since 1954 had the company not tendered, but that the defendant himself had decided that in view of his position as vice-chairman of the housing and town planning committee of the council, his company would not tender in the future for any building contracts of the council. Further, the justices say: "We were of opinion "that the [defendant] was sincere in his statement to us that "his company did not intend to tender for any further council "work." I cannot think that that can affect the question whether there has been an offence committed or not. It goes very clearly to mitigation but not, I think, to defence, because at any time the defendant and the company could have changed their minds and could have tendered. It is a matter which the justices very properly took into consideration in mitigation and they gave what I think is a very appropriate sentence, namely, an absolute discharge. In my view, the justices, who dealt very ably with a difficult case, came to a correct decision, and I would dismiss this appeal.

CASSELS J. I agree. I do not propose to go into the facts of the case but rather to deal with the matter generally. Parliament has certainly since 1882 had the desire to deal with the case of any member of a council who votes or takes part in the discussion of any matter before the council or committee in which he has directly or indirectly by himself or his partner any pecuniary interest. That was continued under section 76 of the Local Government Act, 1933, which has been very frequently referred to during the course of this case, subsection (1) of which provides: "If a "member of a local authority has any pecuniary interest, direct "or indirect, in any contract or proposed contract or other matter, "and is present at a meeting of the local authority at which the "contract or other matter is the subject of consideration . . . ," he must, as early as he can, disclose the fact, take no part in the consideration and discussion and record no vote on any question with respect to the contract or other matter. There is no doubt that the mischief Parliament is aiming at is that members of a local authority should not be, if they have any pecuniary interest direct or indirect, taking such a part in the discussion or voting which might indicate to the public that they were not acting in the public interest, but rather in their own private interest. It is no answer to say that the particular councillor had no pecuniary advantage to obtain by recording his vote. That particular phase of the matter was discussed by Donovan J. in *Brown* v. *Director of Public Prosecutions* [7] when he said, referring to the circumstances of that case: "In those circumstances, no narrow con- "struction ought to be put upon the words 'pecuniary interest'

[7] [1956] 2 Q.B. 369, 378.

" in their context in section 76 (1); in particular, they ought not " to be construed—and the contrary has not been suggested—as " meaning ' pecuniary advantage.' " The whole object seems to me to be that Parliament requires that members of local authorities, when there comes before that local authority a matter in which they have a peculiar interest which is pecuniary, shall restrain themselves and follow the requirements of section 76, that is, disclose that fact and not take part in the discussion or vote on any resolution. One can well see that the confidence which the public has in local administration would be seriously jeopardized if it was thought that a councillor might get, or a group of councillors put their heads together in order to get, an advantage by reason of their pecuniary interest direct or indirect in the matter under discussion.

I am sure the court has been very much obliged to Mr. Wilson for the well-phrased submissions he has made upon this rather difficult question. Also I know that many illustrations can be put forward which perhaps are a little difficult at times to answer, but on the matters that have been mentioned in the course of this case I have no difficulty in arriving at the conclusion that the justices dealt with this matter most efficiently. They convicted, as they were entitled to do, upon what was put before them, and they mitigated by giving an absolute discharge. I also agree with what has been said by the Lord Chief Justice with regard to the defendant. There is no suggestion against his honesty in the matter. He can return to Wisbech feeling that, at any rate, this matter has been well and thoroughly ventilated, and that not a word could be breathed against him for the part he took when this matter was before the council, but, unfortunately, he did have what can be rightly regarded as a pecuniary interest direct or indirect and he should have taken no part at all in the discussion whatever was the part he did take. Councillors, when these matters are coming before their local authority, if I may express a personal opinion, are better absent.

STREATFEILD J. I also agree, although I confess that I have been much impressed by the argument of Mr. Wilson as well as fully endorsing the decision of the justices referred to by the Lord Chief Justice that the defendant, in the attitude which he took, was acting perfectly openly and honourably. One is glad that that was reflected in the absolute discharge which the justices gave him, though they felt obliged to record a conviction. But it is for this court to interpret the words of the legislature against the background of what is obviously the mischief aimed at.

Section 76 of the Local Government Act, 1933, is the successor of section 22 of the Municipal Corporations Act, 1882, which was repealed by the Act of 1933. In the Municipal Corporations Act, 1882, the words were as wide as could possibly be: " A member " of the council shall not vote or take part in the discussion of " any matter before the council, or a committee, in which he has,

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"directly or indirectly, by himself or by his partner, any "pecuniary interest." The corresponding words in the repealing Act of 1933 are: "If a member of a local authority has any "pecuniary interest, direct or indirect, in any contract or pro- "posed contract or other matter . . ." It is argued that the insertion before the words "other matter" of the words "in any "contract or proposed contract" cuts down and narrows in some way the meaning of the words "any other matter." I cannot think that was the intention of Parliament and, as it seems to me, the words "other matter" have no less wide a meaning than they did under the Municipal Corporations Act, 1882. The test, therefore, is whether the councillor has directly or indirectly a pecuniary interest in the matter under consideration. It is to be implied under subsection (2) that he has such an indirect interest if he is a member of a company with which a contract is made or is proposed to be made, or has a direct pecuniary interest in the other matter under consideration. It seems to me that the sole question is whether the defendant's company had a direct pecuniary interest in the matter which was under discussion proposed by one of the councillors that, in future, the borough engineer should be empowered, indeed, as originally moved, should be obliged, to tender for any building contract in the future. As it seems to me, although the defendant's company under his direction in 1956 when he became vice-chairman of the housing and town planning committee, had decided that in future they were not going to tender for any building contracts for the local authority, they had in fact done work until 1954. Although they had so decided that they would not tender in future, it was at all times open to that company as an existing building firm to reverse that policy, and when a tender was advertised under the rules there was no reason why they should not make a tender in competition with others. In those circumstances, it seems to me that that company, so long as it was a building company and was in a position to tender, had a direct pecuniary interest in matters concerning building contracts by reason of this motion, which would have the effect of the borough engineer tendering in competition with other building contractors. So that, in those circumstances, the defendant himself having indirectly a pecuniary interest in the company, and that company having a direct pecuniary interest in the matter under discussion, came within the words of section 76. For those reasons, therefore, in my view, the interpretation which the justices put upon this section was the correct one.

I would like to add a word or two with regard to *Brown* v. *Director of Public Prosecutions*,[8] to which the Lord Chief Justice has referred. That case was concerned under section 76 with certain councillors, some of whom were actually tenants of the corporation and had lodgers, and with three other councillors who

[8] [1956] 2 Q.B. 369.

were existing tenants of the corporation who had not got lodgers. It was held in that case that both lots of councillors had a pecuniary interest in the matter which was in that case under discussion. As Donovan J. put it,[9] even those tenants who had no lodgers nevertheless had a potential income-producing asset; in other words, being holders of an actual contract they could at any time if they liked have taken a lodger, and having that tenancy it was a potential income-producing asset. Both Lord Goddard C.J. and, at any rate by inference, Donovan J., contrasted the position of such tenants with members of the council who were not yet tenants and, indeed, who might never become tenants. I cannot help thinking that, in so far as the phrases used in that case by Lord Goddard and Donovan J. dealt with councillors who were not yet tenants at all, they may be regarded as being obiter being unnecessary for the decision of the case. Without deciding the point, because the matter has not been fully argued, I would be inclined to think that, in the case of councillors who were not yet tenants of council houses, they were excepted by the proviso to section 76 (1) because they were inhabitants. That matter was not argued and the court in *Brown* v. *Director of Public Prosecutions* held that the proviso did not apply, not on that ground, but on the ground that housing was not a public service within the meaning of the proviso, which, of course, it clearly was not.

In my view, the real key to the present case may be found in the concluding words of Donovan J., in referring to those councillors who had houses but no lodgers, when he said[10]: "Their "case is different from a councillor who merely had a hope of "obtaining such a house in the future"—in other words, as inhabitants they might hereafter apply for a council house, which might be or might not be granted; at any rate they would be entitled to ask for one. Here it was an existing building firm in the locality. It had in fact done work for the council until 1954. It was at all times in a position to tender for any building contracts or proposed contracts which might be invited, and in spite of the fact that their policy had been altered for the time being by the defendant it was at all times open to them to reverse that policy and tender in the future. For those reasons, therefore, I think they had more than a hope of obtaining such a contract in the future; indeed, they had a positive right to tender for it when the tender was advertised. For those reasons, therefore, I do not think this case is governed in any way by *Brown* v. *Director of Public Prosecutions* and, in my judgment, I have come to the conclusion that the justices were correct in their decision.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills for Dawbarn, Barr & Knowles, Wisbech; Director of Public Prosecutions.*

J. D. P.

[9] [1956] 2 Q.B. 369, 378.

[10] Ibid.

[QUEEN'S BENCH DIVISION.]

1958
Oct. 21.

LUND *v.* THOMPSON.

Lord Parker C.J., Streatfeild and Diplock JJ.

Road Traffic—Notice of intended prosecution—Subsequent withdrawal of notice—Second notice given out of time—Validity of first notice—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

On February 14, 1958, the defendant was served by the police with notice of intended prosecution under section 21 (*c*) of the Road Traffic Act, 1930,[1] for dangerous driving and driving without due care and attention. Thirteen days later, on February 27, another letter was sent to the defendant by the police stating that after careful consideration the police had decided not to take any further action in the matter. On March 13, a fortnight later, and out of time, a third letter was sent to the defendant stating that after further consideration, the commissioner of police had decided to institute proceedings against the defendant. The defendant was convicted on the lesser charge. On appeal on the ground that the notice of intention to prosecute was out of time:—

Held, that once a notice of intended prosecution under section 21 (*c*) of the Act of 1930 has been given either by the police or a member of the public, the condition precedent to a conviction has been fulfilled, and the subsequent cancellation of the notice did not affect the matter; accordingly, the defendant was properly convicted.

CASE STATED by Mr. Paul Bennett, metropolitan magistrate, sitting at Marlborough Street.

On March 13, 1958, informations were laid by the prosecutor against the defendant charging him with unlawfully driving a motor-vehicle on February 11, 1958, at Eaton Gate, S.W.1, in a manner dangerous to the public and without due care and attention contrary to sections 11 and 12 (1) of the Road Traffic Act, 1930.

At the hearing on April 18, the magistrate found the following facts:

On February 14, 1958, a notice of intended prosecution was served on the defendant, being signed by the acting superintendent of police. On February 27 a letter was sent to the defendant signed by the acting chief inspector of police stating that after careful consideration the police had decided not to take any further action in the matter. On March 13, a further letter was

[1] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor-vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either —(*a*) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (*b*) within fourteen days of the commission of the offence a summons for the offence was served on him; or (*c*) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence."

sent to the defendant on behalf of the assistant commissioner of police, referring to the letter of February 27, and stating that after further consideration the commissioner had decided to institute proceedings against the defendant for driving in a manner dangerous to the public, and for driving without due care and attention.

It was contended by the defendant that section 21 of the Road Traffic Act, 1930, had not been complied with in that the notice of intended prosecution had been withdrawn by the letter of February 27, and the only effective notice of intended prosecution received by him was the letter dated March 13, and this was sent more than 14 days after the commission of the offence alleged. It was contended by the prosecutor that the notice of intended prosecution was valid and could not be, and was not in fact, withdrawn.

The magistrate was of the opinion that section 21 of the Road Traffic Act, 1930, had been complied with in that the notice of intended prosecution dated February 14 was a valid notice and had not been invalidated by any subsequent event. Accordingly, he was of the opinion that he had jurisdiction to hear the informations, and did so. The defendant pleaded Guilty to driving without due care and attention and Not Guilty to driving in a manner dangerous to the public. The magistrate dismissed the charge of driving in a manner dangerous to the public and fined the defendant £5 with £5 costs for driving without due care and attention and ordered his licence to be endorsed.

Cecil Binney for the defendant.

E. A. Machin for the prosecutor.

The following case was referred to in argument: *Pope* v. *Clarke*.[2]

LORD PARKER C.J.: I will ask Diplock J. to deliver the first judgment.

DIPLOCK J. stated the facts, read section 21 of the Road Traffic Act, 1930, and continued: The purpose of section 21 is clear and has been expressed by this court on a number of occasions, namely, that a person concerned in a traffic accident should be informed at an early stage of the intended prosecution so that he can obtain his witnesses and prepare his case. Mr. Binney has argued that paragraph (*c*) of section 21 must be read as containing by implication some such words as "notice of intended prosecu- "tion was served or sent by registered post to him and has not "been withdrawn," or else that the effect of the letter of February 27 is to nullify or cancel the effect of the first notice. A possible alternative way of putting it would be no doubt that

[2] [1953] 1 W.L.R. 1060; [1953] 2 All E.R. 704.

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Diplock J.

as the result of the second letter the police were estopped from proceeding with the prosecution. It seems to me that in Mr. Binney's argument there is implicit a fundamental fallacy that only the police can prosecute for an offence of this nature. That is not so. Although, in all but an infinitesimal number of cases, no doubt information is laid and the prosecution is conducted by a particular police officer, that is not by virtue of his being a police officer; he is exercising the right of any member of the public to lay an information and to prosecute an offence. It therefore follows that when one looks at the three alternative conditions precedent to conviction laid down by section 21, the warning, the serving of the summons or the giving of the notice of intended prosecution, such warning may be given and such summons served or such notice given by any member of the public and not merely by a police officer; and that when such a warning has been given, summons served or notice of intended prosecution given it may be taken advantage of by anyone who wishes to prosecute. It would, indeed, be difficult to argue that where a person has been warned at the time of the accident under section 21 (*a*), a letter written by the police afterwards saying that they did not intend to prosecute would nullify the effect of the warning and so prevent anyone else prosecuting for that offence. It seems to me that the same considerations apply to paragraph (*c*), and that it is impossible to read into that paragraph the words which Mr. Binney seeks to imply. Paragraph (*c*) requires that a notice should be given of intended prosecution, it matters not by whom, within the period laid down by the paragraph, and once that is given, the condition precedent and the only condition precedent to a conviction is fulfilled.

Having come to the conclusion that that is the construction of the Road Traffic Act, 1930, it must not be thought that the habit of sending a letter to say that proceedings will not be brought, and then subsequently sending a letter saying that the police have changed their mind, is a practice to be commended. It is one which may lead in certain circumstances to considerable injustice to the person prosecuted; but though that may be so it does not seem to me that the court can be induced to read further words into the plain words of the Act. It is also to be observed that one of the ultimate sanctions of the rule of law in this country is the right of private persons to lay informations and bring prosecutions. If Mr. Binney's argument were right, it would be possible for the police to use a dispensing power in relation to an intended prosecution by sending a notice under section 21 (*c*) by one post and withdrawing it by the next post. In my view, this appeal should be dismissed.

STREATFEILD J. I agree, but do so with some reluctance. I base my opinion solely on the construction of section 21. It seems to me that, reading the three alternative requirements together, if a policeman was on the spot when an accident

took place and, in fact, warned an offender that the question of his prosecution would be taken into consideration, no amount of subsequent intimation that a prosecution was not going to take place would obliterate the fact that he had been warned, which is the only requirement of section 21 (*a*). In the same way, if a summons were served within 14 days and proceedings actually commenced under paragraph (*b*), no amount of intimation that the summons was not going to be proceeded with would, as it were, undo that summons. Similarly, under paragraph (*c*) where notice has been given of intended prosecution within 14 days, no amount of cancellation of that notice would obliterate the fact that notice was given—and that, on the true construction of this section, is all that is required—that either a warning should be given at the time, or proceedings shall be commenced within 14 days, or a notice of intended prosecution shall be given within 14 days. So long as one or other of those conditions precedent is fulfilled, there is no bar to a conviction. Within the four walls, therefore, of section 21, I agree that Mr. Binney's argument in this court must fail. At the same time when one bears in mind that the basis of the requirements of section 21 is that a person who may be accused of an offence under section 11 or section 12 of the Road Traffic Act, 1930, may be given fair warning or a fair chance to prepare his defence and to call his witnesses, one sees at once that the statement in a printed form, that the police have decided not to take any further action after all, having previously given notice that they intend to prosecute, may cause an accused person to experience a sense of false security and he may allow his witnesses to disperse to the four corners of the world beyond recall. Then, if the police afterwards change their minds and give him notice that they intend to prosecute after all, he may be left in the air so far as his witnesses are concerned. It may therefore be, if that is encouraged, that the purpose of section 21 may fail. I do not say that there is any question of any injustice having resulted in this case because the defendant in fact pleaded Guilty to careless driving and was dealt with on that basis. Of course, some people may even be induced to plead Guilty because they have no witnesses to satisfy the court of their innocence. Although no injustice may have been done in this case, one can conceive that there might be a case where a notice of intended prosecution is given, and then for all practical purposes withdrawn when, if it is reinstated afterwards, it may well work an injustice. One can only say that one can rely, and I am sure with confidence, upon the integrity of the police and still more upon the integrity of the justices to see that no man in fact suffers injustice through it. But one can well sympathize with a man who, having been given a notice by the commissioner of police, having been served with a purported cancelling notice by the same authority, and then out of the blue there comes another letter from the same authority saying that after all he is going to prosecute, feels a sense of grievance. Nevertheless, in

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my view, on a true construction of section 21, what was done in this case was done within the four corners of that section. It is for those reasons, therefore, that I agree with the judgment of Diplock J.

LORD PARKER C.J. With some regret I have come to the same conclusion and I have nothing to add.

Appeal dismissed.

Solicitors: *Amery-Parkes & Co.; Solicitor, Metropolitan Police.*

J. D. P.

[PRIVY COUNCIL.]

J. C.* 1958 *Oct.* 20.

JOHN NEIL MOUAT . . . . . APPELLANT;

AND

BETTS MOTORS LTD. . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Emergency Legislation—Price control—Meaning of "price"—Motor-car—Covenant restricting resale—Covenant not part of consideration—Covenant legal—Breach—Damages, measure of—[New Zealand] Control of Prices Act, 1947, *No.* 51, *s.* 2 (1).

Sale of Goods—Price—Meaning of "price"—New Zealand.

Damages—Sale of goods—Condition not to resell except to seller—Resale on black market to third party—Measure of damages.

New Zealand.

By section 2 (1) of the [New Zealand] Control of Prices Act, 1947: "'Price', in relation to the sale of any goods . . . includes "every valuable consideration whatsoever, whether direct or "indirect; and includes any consideration which in effect relates to "the sale of any goods . . . although ostensibly relating to any "other matter or thing."

The appellant, on buying in 1955 for £1,207—the maximum controlled price under the Control of Prices Act, 1947—a new North American motor-car (then in short supply in New Zealand owing to the economic position) from the respondent dealers, entered into a special covenant with them—as required by the Board of Trade under penalty as a condition of issuing an import licence—under which he agreed not to resell the car within two years unless he first offered it back to the dealers at the original price less a stipulated allowance for depreciation. In breach of the covenant the appellant sold the car three months later for £1,700, and thereupon the respondent dealers claimed £543 as damages for breach of covenant, being the difference between the purchase price of £1,207 less £50 depreciation, namely, £1,157, at which he ought to have offered it to them, and the price of £1,700, at which he had sold the car. The appellant contended that the covenant was illegal and unenforceable because it offended against the Control of Prices Act,

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

1947, in that the dealers by taking the special covenant were taking a valuable consideration relating to the sale and which formed part of the price in addition to the maximum controlled price of the car:—

Held, that under the statutory definition the only kind of valuable consideration which came within the "price" was a valuable consideration "which in effect relates to the sale." The special covenant did not relate to the sale; the sole and entire inducement for the transfer of the property was the cash sum of £1,207. The special covenant was given for the privilege of being allowed to buy a new car, its purpose being to stop the purchaser taking advantage of his privileged position contrary to the interests of the trade and the public; it was a prerequisite to the transfer of the property and not part of the consideration for it, and could not properly be said to form part of the "price" within the statutory definition. The special covenant was not, therefore, illegal.

Further, even if the "price" did include the special covenant, there was no illegality, for the importers of the car were entitled to assume that the price control authority knew that dealers had to exact a special covenant and fixed the maximum price on that basis, and thus the price charged by the dealers, even if it was to be regarded as including the special covenant, was in conformity with the price fixed by the price control authority.

The fact that under the Board of Trade conditions the respondents, had the appellant sold the car to them for £1,157, could not have resold it at a price exceeding its price new—£1,207—was a matter peculiar to the dealers and was no concern of the appellant. The respondents were entitled in law to be put into as good a position as if the appellant had fulfilled his covenant, and were entitled to buy a similar car at the market price. That rule applied even though the only available market was a surreptitious market which was fed by persons who had broken their covenants. The price of the car in that market was £1,700, and the respondents were entitled to the sum claimed.

Williams Brothers v. *Ed. T. Agius Ltd.* [1914] A.C. 510 at 531 and *British Motor Trade Association* v. *Gilbert* [1951] 2 T.L.R. 514; [1951] 2 All E.R. 641 considered.

Judgment of the Court of Appeal of New Zealand [1957] N.Z.L.R. 380 affirmed.

APPEAL (No. 1 of 1958) from a judgment of the Court of Appeal of New Zealand (Gresson and McGregor JJ., Adams J. dissenting) (March 8, 1957) affirming a judgment of the Supreme Court of New Zealand (Barrowclough C.J.) (June 26, 1956) awarding the respondents, Betts Motors Ltd., £543 damages and costs for breach of a contract in an action brought by them against the appellant, John Neil Mouat.

The following facts are taken substantially from the judgment of the Judicial Committee: On March 7, 1955, John Neil Mouat, a farmer, bought a new 1954 Chevrolet motor-car for £1,207. He bought it from dealers called Betts Motors Ltd., and at the same time he entered into a special covenant with them in these terms:

"1. The covenantor will not (except by will) during the space "of two years after the delivery of the said vehicle to the covenan- "tor deal with the said vehicle in any manner whereby any other "person or corporation may become entitled to the possession or

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" use of the said vehicle other than for the private purposes of the " covenantor or for the purpose of carrying on any profession " trade or business of the covenantor or whereby the property in " the said vehicle (or any charge thereon) is or may be or become " liable to be transferred to or vested in any other person or " corporation or whereby any mortgage or charge thereon is con- " ferred upon any other person or corporation without first making " an offer to the dealer (irrevocable for fourteen days) to resell the " said vehicle to the dealer at the original sale price thereof set " out in the schedule hereto less an allowance by way of depre- " ciation calculated at the rate of ten pounds (£10) for every " complete 1,000 miles run by the said vehicles since the date of " delivery to the covenantor but so that such allowance shall not " be less than fifty pounds (£50) or more than one hundred and " fifty pounds (£150) and at the time of making such offer " delivering the said vehicle and leaving it for examination for a " reasonable time with the dealer.

" 2. The covenantor will for every breach of his agreement " with the dealer hereinbefore contained pay to the dealer as and " by way of liquidated damages and not as a penalty (but with- " out prejudice to any other rights and remedies of the dealer " hereunder) the sum of one thousand pounds (£1,000)."

The price paid by Mouat was £1,207: but in breach of the covenant Mouat, three months later, sold the car for £1,700. Betts Motors Ltd. thereupon sued him for damages for breach of covenant. They admitted that they could not recover the £1,000 because it was a penalty, but they sought to recover damages assessed on the following basis: Mouat, instead of selling the car for £1,700, ought to have offered to resell it to Betts Motors Ltd. for £1,157 (being £1,207 less £50 depreciation): and they claimed £543 (being the £1,700 he got less the £1,157 at which he ought to have offered it to them). Mouat pleaded that the covenant was illegal and unenforceable. He contended that the covenant was a valuable consideration relating to the sale of the car and so formed part of the price, within the meaning of the Control of Prices Act, 1947, and was accordingly illegal and unenforceable by virtue of section 29 (1) thereof. Alternatively, he said that the damages recoverable were not £543 but only £50.

By the Control of Prices Act, 1947, s. 2 (1): " ' Price ', " in relation to the sale of any goods or to the performance of " any services, includes every valuable consideration whatsoever, " whether direct or indirect; and includes any consideration which " in effect relates to the sale of any goods or to the performance " of any services, although ostensibly relating to any other matter " or thing."

Section 29 (1): " While a Price Order or a special approval " in respect of any goods remains in force every person who, " whether as principal or agent, and whether by himself or his " agent, sells or agrees or offers to sell any goods to which the " Order or approval relates for a price that is not in conformity

"with the Order or approval commits an offence against this "Act."

1958. July 17, 21, 22. *R. B. Cooke* for the appellant. *J. G. Le Quesne* for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[1]; *Thomas* v. *Thomas*[2]; *Blashill* v. *Chambers*[3]; *Rodocanachi, Sons & Co.* v. *Milburn Brothers*[4]; *Stockloser* v. *Johnson*[5]; *Biggin & Co. Ltd.* v. *Permanite Ltd., Berry Wiggins & Co. Ltd. (Third Parties)*[6]; *Barrow* v. *Arnaud*[7]; *J. Leavey & Co. Ltd.* v. *G. H. Hirst & Co. Ltd.*[8]; *Household Machines Ltd.* v. *Cosmos Exporters Ltd.*[9]

Oct. 20. The judgment of their Lordships was delivered by LORD DENNING. In 1954 and 1955 the motor-car trade in New Zealand was faced with a problem. There was a big demand for new motor-cars from North America: but there were not enough dollars available to pay for them all. So the number imported had to be strictly limited. The problem was how to ensure that this limited number was fairly distributed. To secure this, the Board of Trade introduced a licensing system under which no person could get one of these new cars unless he could show a special case for it. He might, for instance, be a doctor who needed it for his work. But it is obvious that, unless there were safeguards, such a system would be open to abuse. A person might put forward a plausible case for a new car and so get it from an authorized dealer at the list price: but then soon afterwards resell it at a much higher price to someone else, thus making an undeserved profit. In order to protect the trade and the public from such abuses, the dealers in New Zealand used to require the purchaser of a new car to enter into a special covenant not to resell the car within two years unless he first offered it back to the dealer at the original price less depreciation. The present case concerns one of these special covenants.

[His Lordship stated the facts and the terms of the covenant, and continued:] Their Lordships propose first to consider the legality of this covenant. It is said to be illegal because it offended against the statute which controlled prices. The controlled price for this car was £1,207, which was the maximum which could be charged for it: and it is said that, by taking the special covenant, the dealers were taking a valuable consideration in addition to the price. The dealers replied that they were

[1] [1915] A.C. 847; 31 T.L.R. 399.
[2] (1842) 2 Q.B. 851.
[3] (1884) 14 Q.B.D. 479; 1 T.L.R. 151.
[4] (1886) 18 Q.B.D. 67; 3 T.L.R. 115.
[5] [1954] 1 Q.B. 476; [1954] 2 W.L.R. 439; [1954] 1 All E.R. 630.
[6] [1951] 1 K.B. 423; 66 T.L.R. (Pt. 2) 944; [1950] 2 All E.R. 859.
[7] (1846) 8 Q.B. 604, 609.
[8] [1944] K.B. 24; 60 T.L.R. 72; [1943] 2 All E.R. 581.
[9] [1947] K.B. 217; 62 T.L.R. 757; [1946] 2 All E.R. 622.

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compelled to take the covenant. The Board of Trade only allowed the car to be imported on condition that the dealers insisted on such a covenant. These contentions make it necessary for their Lordships to set out the two forms of control exercised over cars at this time by the authorities in New Zealand.

The one control was exercised by the Board of Trade under the authority of section 46 of the Customs Act, 1913, as amended by section 8 of the Customs Acts Amendment Act, 1939, and section 3 of the Customs Acts Amendment Act, 1953. Under those sections no cars could be imported without licence, and the Board of Trade could grant licences subject to conditions. The import licence in this case was given by authority of June 4, 1954, to General Motors Ltd. They were allowed to import cars from Canada and the U.S.A., subject to a series of conditions which included, in particular, these two—

"9. In order to assist in ensuring distribution for essential "needs, each dealer will require the purchaser to sign a deed of "covenant or an agreement that in consideration of the payment "of, say, 1s. by the dealer, the purchaser will not within a "period of two years from the date of purchase of the new car sell "or transfer or otherwise dispose of the car except to resell it to "the dealer at the price which the car has been sold, less "depreciation at a fixed rate.

"10. Upon a purchase by a dealer under the preceding para- "graph, the dealer will not resell the car at a price exceeding "the price at which the car was sold new, plus any necessary "reconditioning cost charged at ordinary rates . . . On any resale, "the dealer will require the purchaser to enter into a deed of "covenant or agreement of the kind set out in the preceding "paragraph to cover the unexpired balance of the original period "of two years."

Under the Customs Act, it was provided that if any person committed any breach of the conditions or was knowingly concerned in any such breach, he was liable to a penalty of £200 or the value of the goods.

In view of those conditions it is plain that the dealers, Betts Motors Ltd., had no option but to insist on Mouat signing a covenant as a condition of getting the car.

The other control was exercised by the Price Tribunal set up under the Control of Prices Act, 1947. Under sections 15 and 16 of that Act the tribunal were empowered to make price orders fixing the maximum prices that could be charged for goods or to give special approval to a selling price in respect of the sale of any goods. The maximum price in this case was fixed by a special approval contained in a direction which the Director of Price Control issued by a letter to General Motors Ltd. in these terms:

"1954 and 1955 Chevrolet Sedans

"In pursuance of a recent decision by the Price Tribunal "regarding maximum prices for motor-cars imported completely "knocked down from North America, Dominion wide maximum

" retail selling prices are now approved for Chevrolet Sedans as " follows:

" 1954 £1,207 each
" 1955 £1,238 each."

It was agreed by counsel that that direction must, for present purposes, be taken to have been in force on March 7, 1955, before Betts Motors Ltd. made the sale to Mouat. The question is whether it was legitimate for Betts Motors Ltd., in the face of that direction, not only to charge £1,207 for the car, but also to take the special covenant. This depends on the true application to this case of the following provisions of the Control of Prices Act, 1947. [His Lordship read section 2 (1) and section 29 (1) of the Act of 1947, and continued:] In applying those sections to the present case, the first question is: what was the " price " charged for this Chevrolet car? Was it £1,207 alone, or was it £1,207 plus the special covenant? Their Lordships are of opinion that, under the statutory definition, the only kind of valuable consideration which comes within the " price " is a valuable consideration " which in effect relates to the sale." The special covenant in this case was, in a sense, valuable consideration—just as any collateral contract is consideration for the making of a main contract—but it did not relate to the sale. It is of the essence of a sale that the property in the goods should be transferred from the seller to the buyer: and a valuable consideration only relates to the sale if it is given as the inducement—or one of the inducements—for the transfer of the property. In this case the sole and entire inducement for the transfer was the cash sum of £1,207. The special covenant was not given for the property but for something different. It was given for the privilege of being allowed to buy a new car. It was not expected to yield any benefit to the seller. Its purpose was to stop the purchaser taking advantage of his privileged position contrary to the interests of the trade and the public. It was a prerequisite to the transfer of the property and not part of the consideration for it. In these circumstances their Lordships think it cannot properly be said to form part of the " price " within the statutory definition.

Even if the " price " did include the special covenant, their Lordships think there was no illegality. The only document fixing the maximum price of £1,207 was contained in a letter from the Director of Price Control to the importers, General Motors Ltd. Their Lordships agree with McGregor J. in thinking that, when the Director of Price Control sent this letter, he must be presumed to have been aware of the conditions imposed by the Board of Trade—which required the dealers to exact this special covenant. It would be a strange thing if one Government Department—the Director of Price Control—was unaware of what another Government Department—the Board of Trade—was doing in relation to the self-same cars. The Board of Trade on June 4, 1954, gave the import licence and imposed the conditions. The

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price control in 1955 fixed the maximum price of £1,207. Each was contained in a letter to the self-same importers, General Motors Ltd. The importers who received those letters were entitled to assume that the right hand of government knew what the left hand was doing, and therefore to assume that the Director of Price Control knew that dealers had to exact a special covenant and fixed the maximum price on that basis. In other words, the letter fixing the maximum price must be read as if there were added to it the words: "It is understood, of course, that in "selling at this price the dealers will be exacting a special "covenant as required by the Board of Trade conditions." So read, it is clear that the price charged by the dealer, even if it is to be regarded as including a special covenant, was in conformity with the price fixed by the price control.

It was pointed out that this special covenant is somewhat different in its terms from that required by the Board of Trade conditions: but the differences are not so substantial as to affect the matter. The £1,207 plus this special covenant was still in conformity with the price direction.

Their Lordships are of opinion, therefore, that this special covenant was not illegal, and they turn to the question of damages. It is said that the damages suffered by the dealers only amounted to £50. If Mouat had performed his covenant and offered to resell the car to the dealers, Betts Motors Ltd., for £1,157 (£1,207 less £50 depreciation), the dealers, under the Board of Trade conditions (which their Lordships have set out), could only have resold it for £1,207. So their loss, it is argued, is only £50. The result of this argument, if right, is that Mouat would benefit to the extent of nearly £500 by breaking his covenant. He made a profit on resale of £543 (£1,700 less £1,157) and would only have to pay £50 damages.

In the opinion of their Lordships the argument is not well founded. It does not lie in Mouat's mouth to say that, if he had fulfilled his covenant, the dealers could only resell the car for £1,207. That was a matter peculiar to the dealers which was no concern of his. The dealers were entitled in law to be put into as good a position as if he had fulfilled his covenant: and to do this they were entitled to go into the market and buy a similar car at the market price; see *Williams Brothers* v. *Ed. T. Aguis Ltd.*[1] by Lord Moulton. This rule applies even though the only available market is a surreptitious market which is fed by persons who have broken their covenants; see *British Motor Trade Association* v. *Gilbert.*[2] The market price of this car in that market was £1,700. At any rate, Mouat can hardly deny that that was its market price, since that is the sum for which he sold it: and the damages should be the difference between that market price of £1,700 and the contract price of £1,157.

[1] [1914] A.C. 510, 531.

[2] [1951] 2 T.L.R. 514; [1951] 2 All E.R. 641.

Their Lordships find themselves, therefore, in agreement with the decision of Barrowclough C.J. and the majority of the Court of Appeal in New Zealand, and will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs.

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Solicitors: *Rose, Johnson & Hicks; Wray, Smith & Co.*

C. C.

[CHANCERY DIVISION.]

In re SEBBA, DECD.
LLOYDS BANK LTD. *v.* HUTSON AND OTHERS.

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Oct. 16, 17, 21.
Danckwerts J.

[1957 S. No. 2419.]

Administration of Estates—Order of application of assets—Death duty — Canadian assets — Canadian duties — Incidence — Expenses of getting in testator's estate—British estate duty credit.
Will — Construction — Investment clause — "South African trustee "securities"—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 1.

A testator, after giving a large number of pecuniary legacies and specific legacies of chattels, by clause 5 of his will directed that his residue be held on trust for sale and conversion "upon trust "(a) to pay thereout all my just debts funeral and testamentary "expenses and the legacies given by this my will or any codicil "hereto; (b) to invest the residue of such moneys in South African "trustee securities only with power to vary such investments for "others of a like nature . . . " He gave his residue in various fractions on trusts for his relatives providing for life interests and interests in capital.

His personal estate included shares in companies situate in the Province of Ontario, Canada; no part of these assets was specifically devised but they formed part of his residuary estate. The will contained no specific directions in respect of the payment of death duties. British estate duty at 50 per cent. was payable on the estate; and Dominion succession duty and Ontario succession duty were leviable on the Canadian assets. A credit was allowable by the Inland Revenue under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, in respect of the Dominion succession duty, and although no order existed in respect of the Ontario succession duty, the Inland Revenue by way of concession allowed the amount of duty levied to be deducted as a debt in assessing the value of the assets affected:—

Held, (1) that the Canadian duties were payable out of the general residue as part of the expenses of getting in the assets situate in that country.

Dicta of Jenkins L.J. in *In re Goetze* [1953] Ch. 96; [1953] 2 W.L.R. 26; [1953] 1 All E.R. 76 applied.

(2) That the interests given by the will must bear a rateable proportion of the British estate duty payable in respect of the Canadian assets.

(3) That the credit secured in respect of Canadian succession duty by the order of 1946, and the concession allowed in respect of

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the Ontario succession duty enured for the benefit of the persons by whom the British estate duty leviable in respect of those duties fell to be borne rateably according to the incidence upon them of the British estate duty.

In re Goetze (supra) and *In re Cunliffe-Owen* [1951] Ch. 964; [1951] 1 T.L.R. 1073; 2 T.L.R. 231; [1951] 2 All E.R. 220 applied.

(4) That the testator's direction to invest in "South African "trustee securities only" did not compel the trustees to limit the investments to trustee investments within the meaning of the Trustee Act, 1925, but they could invest in such form of investments as were regarded by the courts of South Africa or any province thereof as suitable investments of trust funds.

ADJOURNED SUMMONS.

Adolph Sebba by his will, dated August 18, 1955, having appointed Lloyds Bank Ltd. as executor and trustee thereof, gave a large number of pecuniary legacies and specific legacies of certain chattels. By clause 4 he directed the bank to set aside from his estate "securities sufficient to raise the sum of £3 a "week to be paid to my late secretary Mrs. Winifred Birt-"well . . . for her life . . ." and after her death he directed the bank to divide the capital so appropriated equally between "my brothers Sam and Joe Sebba and my sister Sarah Lewis or "such of them as shall survive the said annuitant. . . ."

By clause 5 the testator devised and bequeathed all the residue of his real and personal estate on trust for conversion, and directed the bank to hold the net proceeds of sale and conversion and his ready money upon trust "(a) to pay thereout all my just "debts funeral and testamentary expenses and the legacies given "by this my will or any codicil hereto; (b) to invest the residue "of such moneys in South African trustee securities only with "power to vary such investments for others of a like nature at "the bank's discretion. . . ."

The testator by clause 5 (c) directed the bank to hold his residuary trust fund in various fractions on trusts for his relatives, providing for life interests and interests in capital. The testator gave the bank power to postpone sale and conversion, and by clause 8 he directed the bank "so soon as all executorial duties "shall have been completed to transfer and vest the whole of "my residuary trust fund to and in the Standard Bank of South "Africa Ltd. to hold the same upon and subject to the trusts "powers and provisions hereinbefore declared of and concerning "my said residuary trust fund. . . ."

The testator made a codicil dated September 28, 1955, by which he gave certain further pecuniary legacies and revoked one of the specific legacies in the will.

He died on September 29, 1955, domiciled in England.

He did not own any land, and left a large personal estate which included (1) shares in two companies situated in Ontario, a province of Canada, (2) shares in a gold mining company in South

Africa, and (3) shares in the Radio Corporation of America in the United States.

Estate duty in England was leviable on the testator's estate at the rate of 50 per cent. South African estate duty amounting to the sum of £207 9s. 11d. became payable in respect of the South African shares, and Federal estate duty amounting to the sum of 102.46 United States dollars (about £36) became payable in the United States in respect of the Radio Corporation shares. In the case of the shares situate in Ontario, Dominion succession duty became leviable, and the amount was 3,788.86 Canadian dollars for principal and 11.44 Canadian dollars for interest, equal to about £1,380 in all. Ontario succession duty also became leviable, and the amount was 15,590.47 Canadian dollars for principal plus 344.39 Canadian dollars for interest, equal to a sum of £5,810 in all.

By reason of agreements made between the countries concerned, the sum paid in South Africa and the United States of America and to the Dominion of Canada were allowed by the Commissioners of Inland Revenue in England as if they were payments on account of British estate duty, and credit was given for the amounts so paid against the sums payable for British estate duty. But there was no corresponding agreement in respect of the Province of Ontario duty, and so a similar allowance was not admissible in respect of that duty, but the amount thereof was allowed in effect as a deductible debt in assessing the property on which British estate duty was levied.

The plaintiff bank took out this summons to have determined questions arising under the will on which the following questions were relevant to this report: whether on the true construction of the will and codicil of the testator: (1) the following duties (thereinafter referred to as " the foreign duties "), namely (i) succession duty of the Dominion of Canada, (ii) succession duty of the Province of Ontario, (iii) estate duty of the Union of South Africa, and (iv) Federal estate tax of the United States of America, leviable in respect of movable assets of the testator situate outside Great Britain at the time of his death and not specifically bequeathed by the said will or codicil (thereinafter collectively referred to as the " foreign assets "), and any interest payable in respect of the foreign duties, ought to be borne, as between the several persons beneficially interested: (a) out of the general residuary estate of the testator as expenses of getting in the foreign assets, or (b) out of the respective beneficial interests of the said persons, according to the incidence of the foreign duties and interests under the respective laws imposing the same, or (c) in some other and what manner; (3) the pecuniary legacies thereby bequeathed (other than those given by clause 4) ought to bear such rateable part of the estate duty leviable in respect of the foreign assets under the law of Great Britain (and any interest payable in respect of such duty) as was attributable to the said legacies respectively in a due course of administration pursuant

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to clause 5 of the will; (4) the annuity given to the defendant, Winifred Birtwell, by clause 4, and the other beneficial interests given by that clause ought in like manner as aforesaid to bear a rateable part of the estate duty leviable in respect of the foreign assets under the law of Great Britain (and any interest payable in respect of such duty); and if so, in what manner such estate duty ought to be taken into account in setting aside and subsequently dealing with the fund directed to be appropriated by the said clause 4; (5) the allowances obtainable under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, the Double Taxation Relief (Estate Duty) (South Africa) Order, 1947, and the Double Taxation Relief (Estate Duty) (U.S.A.) Order, 1946, by way of credit against estate duty leviable in respect of the foreign assets under the law of Great Britain, ought respectively, as between the several persons beneficially interested to enure for the benefit of (a) the general residuary estate of the testator, or (b) the persons by whom the relevant foreign duties (in respect of which such allowances were made under the said orders) fell to be borne, rateably according to the incidence upon those persons of the said foreign duties, or (c) the persons by whom the said British estate duty leviable in respect of the foreign assets fell to be borne (or would, in the absence of the said allowance fall to be borne), rateably according to the incidence upon those persons of the said estate duty; (6) the diminution in the amount of estate duty leviable under the law of Great Britain in respect of such of the foreign assets as were at the testator's death situated in the Province of Ontario, which arose by reason of succession duty paid in that province being allowed as a deduction in computing the value of those assets for the purpose of the said British estate duty, ought as between the several persons beneficially interested under the said will and codicil, to be treated in the same manner as the allowances in question 5, or in some other and what manner; . . . (8) whether upon the true construction of the said will the " South African trustee securities " authorized by clause 5 thereof for the investment of the testator's residuary estate were: (a) securities for the time being regarded as suitable for the investment of trust money according to the practice of the courts of the Union of South Africa or any province thereof, or (b) securities of the Union of South Africa or any province thereof for the time being authorized by the law of England for the investment of trust money, or (c) some other and what class of securities.

E. I. Goulding for the plaintiff.

L. H. L. Cohen for the pecuniary legatees.

T. L. Dewhurst for pecuniary legatees and persons interested in the income of residue.

Andrew Goodall for the infant beneficiary interested in capital in reversion.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

October 21. DANCKWERTS J., having stated the facts, read the following judgment: The question which I have to decide is the effect of these duties on the beneficial interests created by the will and codicil. In the case of the South African and United States duties, the rate of duty depends on the aggregate dutiable estate, and the executor is liable for the duty which is borne primarily by the residuary estate, in the absence of some contrary provision in the will.

Normally, words exempting from death duties in an English will are confined to the duties imposed by British legislation, and do not extend to duties imposed by the laws of other countries: see *In re Norbury* [1] and *In re Cunliffe-Owen*.[2] And from the latter case it would appear that "testamentary "expenses" is not an apt phrase to describe duties leviable under the laws of other countries: see also *In re Scull*.[3]

There was no real dispute that the South African and United States duties resembled British estate duty in character and were payable out of the residuary estate.

The position as regards the duties leviable by the Dominion of Canada and the Province of Ontario provide more difficult questions. In a desire to save expense the plaintiff bank did not provide expert evidence of the nature of these duties, anticipating that the defendants might wish to file such evidence. The defendants, however, have not filed any evidence, and I am left with the summary of the effect of the duties contained in the affidavit of the manager of the plaintiff bank's executor and trustee department. Fortunately, the Dominion succession duty was considered by the Court of Appeal in *In re Goetze*,[4] and I have the benefit of a statement of the nature of the duty by Jenkins L.J. as follows [5]: "From the affidavit of a Canadian lawyer filed "in the present proceedings it appears: (1) that Canadian succes- "sion duty is assessed and chargeable on all successions on death "to Canadian property; (2) that for this purpose (so far as now "material) 'succession' means every disposition of property "whereby any person becomes entitled to any property or the "income thereof upon the death of any person; (3) that where "the deceased was at the time of his death domiciled outside "Canada the duty is exigible upon or in respect of the succession "to all property situated in Canada; (4) that the duty in respect "of any succession under the will of a testator is assessed at rates "varying with the aggregate net value of the Canadian property

[1] [1939] Ch. 528, 55 T.L.R. 589; [1939] 2 All E.R. 625.

[2] [1951] Ch. 964; [1951] 1 T.L.R. 1073; 2 T.L.R. 231; [1951] 2 All E.R. 220.

[3] (1917) 118 L.T. 7.

[4] [1953] Ch. 96; [1953] 2 W.L.R. 26; [1953] 1 All E.R. 76.

[5] [1953] Ch. 96, 101.

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"passing on the death, and the relationship of the successor to "the testator, and that there are certain exemptions, one of which "frees successions less than $1,000 from the duty; (5) that the "successor is liable for the duty assessed in respect of any succes- "sion under the will of a testator but that such duty is neverthe- "less payable by and recoverable from the executors to the "extent of the property administered by them, with a right for "executors who are required to pay the duty to deduct it in "paying over the amount of the succession or to recover it from "the successor personally in the event of the succession being "satisfied otherwise than in money."

I think that I am entitled to take that as a fair statement of the nature of the Dominion succession duty. As regards the succession duty imposed by the Province of Ontario, counsel have provided me with the text of the Ontario Succession Duty Act, as revised and consolidated in 1950. I find that by section 5, subject to the exemptions contained in sections 3 and 4, on the death of any person whether he dies domiciled in Ontario or elsewhere, where any property situate in Ontario passes on his death, duty is to be levied on such property in accordance with the dutiable value thereof. Under section 6 the rates of duty vary according to the aggregate value of the estate and according to the relationship of the person to or for whose benefit the property passes, i.e., whether lineal relatives, collaterals, or strangers in blood. I observe that by section 8 an allowance is to be made for estate, agency or succession duty payable in any jurisdiction designated by the Lieutenant-Governor in Council. By section 9, on the death of any person, whether he dies domiciled in Ontario or elsewhere, unless the consent in writing of the treasurer is obtained, no bank, trust company, insurance company or other corporation having its head office, principal place of business, office from which payments are made, register of transfers, or any place of transfer, in Ontario may deliver, assign, transfer or pay, or permit the delivery, assignment, transfer or payment of any property situate in Ontario in which the deceased at the time of his death had any beneficial interest, and penalties are imposed for breach of this provision.

By section 11 every person resident in Ontario at the date of death of the deceased to whom or for whose benefit any property in Ontario passes on the death of the deceased is liable for the duty levied on the proportion of such property which so passes to him or for his benefit, together with such interest as may be payable thereon. By section 19, where any duty is levied on property passing on the death of the deceased, such duty or so much thereof as remains unpaid, with interest thereon, is to be and remain a first lien and charge on such property until paid or a certificate is given discharging such property. It is provided by section 24 that an executor or trustee, as such, shall not be personally liable for any duty, but an executor, trustee or person in Ontario in whom any property passing on the death of the

deceased is at any time after the death of the deceased vested, or who has the management or control thereof, shall not transfer any such property to the person beneficially entitled thereto without deducting therefrom or collecting an amount sufficient to pay the duty and interest payable by such person.

There does not appear to be any personal liability for duty under the statute on any person who is not resident in Ontario. I apprehend that in the case of non-residents the security for the payment of the duty is provided by section 9 (prohibition of transfers), and section 19 (lien on the property), particularly as the treasurer has power under section 31 to put a stop order by writing or telegram on any property or evidence of title which he believes is about to be removed from Ontario without provision for the duty payable.

In *In re Goetze* [6] Jenkins L.J. refers to a suggestion that, irrespective of any special direction in the will, and independently of the provisions of the Double Taxation Order, the Canadian succession duty might perhaps properly be regarded simply as part of the cost of getting in the Canadian estate, and as such falling on residue generally. This point appears not to have been put forward at all in *In re Cunliffe-Owen*,[7] and apparently it was thought unnecessary to present an argument on it in *In re Goetze*.[8] But it seems to me an attractive method of disposing of the matter, and Jenkins L.J. does discuss it in *In re Goetze*, he said [9]: "This is not a case of a specific gift of property situated "in a foreign country and attracting duty by virtue of the laws "of that country, or a gift to a legatee domiciled or resident "abroad which attracts duty in the hands of the legatee under "the law of his or her domicile or place of residence. It is "simply a case in which property situated in Canada has passed "under a general residuary devise and bequest in the English will "of a testatrix domiciled and resident here, and in which this "country is the appropriate forum of administration. The "residue, including the Canadian estate, is given upon the usual "trusts for sale and conversion and payment of funeral and "testamentary expenses and debts and pecuniary legacies and "annuities and the United Kingdom duties thereon, and subject "to these payments in trust for the respondent residuary legatee. "To get in the Canadian estate and make it available for application as above, the executors had to pay the estate duty on the "Canadian property. It is true that under the law of Canada "the duty in question was assessed on the beneficial interests, "and according to that law would fall ultimately to be borne by "the beneficiaries concerned, the extent of their beneficial "interests in the Canadian estate being ascertained by treating "them as provided rateably out of the net Canadian and English "estates, and the rates of duty varying with the relationship of

[6] [1953] Ch. 96, 111.
[7] [1951] Ch. 964.
[8] [1953] Ch. 96.
[9] Ibid. 111, 112, 113.

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"the beneficiaries to the testatrix. But it does not necessarily "follow that these features of the Canadian fiscal law, involving "as they do a wholly artificial apportionment of debts and "benefits as between the Canadian and English estates, should "be imported into an English administration, and the alternative "course of treating the amount of the Canadian duty simply as "part of the cost of getting in the Canadian estate, without "regard to the peculiarities of the local law as to mode of assess-"ment and incidence, would certainly have the merit of "simplicity. The possible view to which I am now calling "attention is supported by *Peter* v. *Stirling* [10] and *In re* "*Maurice*,[11] and particularly the latter case, where an Australian "duty assessed by reference to the ages of the beneficiaries was "held payable out of the estate as a whole and not out of the "respective interests of the beneficiaries in accordance with the "amounts assessed upon them in Australia. These two cases "were distinguished by Swinfen Eady J. in *In re Brewster*,[12] "which was a case of a specific devise, on trusts separate from "those of the residuary estate, of land in Melbourne, Victoria, "Australia, in which it was held that the local death duties and "other costs of realizing the Melbourne property fell on that "property and not on residue. *Peter* v. *Stirling* [13] was also dis-"tinguished by Warrington J. in *In re Scott*,[14] where it was held "that the French mutation duty on chattels situated in France "should be borne by the specific legatees thereof and not by "residue; and Warrington J.'s decision was upheld in the Court "of Appeal. But there is nothing in the judgment of Swinfen "Eady J. in *In re Brewster* [15] or of Warrington J. or the Court "of Appeal in *In re Scott* [16] to suggest that *Peter* v. *Stirling* [17] "and *In re Maurice* [18] were wrongly decided. On the contrary, "Warrington J.'s explanation in *In re Scott* [19] of the ratio "decidendi in *Peter* v. *Stirling* [20] seems to me to bring it fairly "close to the present case, and his judgment was affirmed with-"out qualification in the Court of Appeal. As the point has not "been argued in the present case, and if made good would lead "to the same conclusion as I have reached on other grounds, I "express no opinion about it one way or the other, but merely "refer to it lest this judgment, which is framed in accordance "with the arguments presented, should be regarded as implicitly "concluding it if raised in any future case."

The facts in the present case are similar to the situation described by Jenkins L.J. in *In re Goetze*.[21] *Peter* v. *Stirling* [22] and *In re Maurice*,[23] I would add, seem to me to support entirely the view put forward by Jenkins L.J. It is quite clear that in

[10] (1878) 10 Ch.D. 279.
[11] (1896) 75 L.T. 415.
[12] [1908] 2 Ch. 365.
[13] 10 Ch.D. 279.
[14] [1914] 1 Ch. 847.
[15] [1908] 2 Ch. 365.
[16] [1914] 1 Ch. 847.
[17] 10 Ch.D. 279.
[18] 75 L.T. 415.
[19] [1914] 1 Ch. 847.
[20] 10 Ch.D. 279.
[21] [1953] Ch. 96.
[22] 10 Ch.D. 279.
[23] 75 L.T. 415.

In re Brewster,[24] Swinfen Eady J. did not cast any doubt upon the correctness of the decisions in those two cases. He pointed out that in the case [25] before him the contest was between a specific devise and residue, a situation which is different from that in the present case. Similarly, in *In re Scott* [26] (affirmed in the Court of Appeal [27]), the contest was between the specific legatee of valuable tapestries attached to the walls of the testator's house in Paris and those interested in the residuary estate; and the evidence of French lawyers was that in France executors were ignored and the beneficiary was the person liable for the duty and to whom the authorities looked for payment thereof. Warrington J. held that the French mutation duty had to be borne by the specific legatee as it was a debt due by the legatee, which the executors had paid on her behalf, and, therefore, distinguishable from the duties in *Peter* v. *Stirling*,[28] which were part of the expenses which had to be incurred by the executors in getting in and transmitting to this country the Australian assets. In the present case no part of the assets in Ontario have been specifically bequeathed. They are part of the general residuary estate out of the whole of which the pecuniary legacies have to be paid, and the ultimate residue of which is divisible amongst the residuary legatees in the manner directed by the testator.

The position in the case of the Ontario duty is really even clearer than in the case of the duty levied by the Dominion of Canada. In the case of the Ontario duty there appears to be no personal liability on any person who is not resident in Ontario. The position is that any transfer of the property situate in the province is held up, and a lien for the amount of the duty is imposed until payment of the duty is made to the treasurer. Consequently, the executor is faced with the necessity of paying the duty in order to free the assets of the estate situate in the province and collect them for the purposes of the administration of the estate. In the case of both the Dominion duty and the duty imposed in the Province of Ontario, it seems to me that the duties are expenses of getting in the testator's estate, and are not expenses of getting in any asset which is the subject of a specific bequest. A similar result was reached in respect of succession duty payable to the Dominion and Provincial Governments of Canada in *In re Blake*,[29] where the English cases are discussed.

In my view, all the duties mentioned in question 1 of the originating summons are payable out of the general residuary estate of the testator as expenses of getting in the assets situate in the countries concerned.

[His Lordship made a declaration on question 1 in the terms of alternative (a); and in the circumstances question 2 did not arise. On questions 3 and 4 his Lordship made the following declarations respectively:] (3) That the pecuniary legacies ought

[24] [1908] 2 Ch. 365.
[25] Ibid. 368.
[26] [1914] 1 Ch. 847.
[27] [1915] 1 Ch. 592.
[28] 10 Ch.D. 279.
[29] [1955] I.R. 89, 108, 110.

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to bear such rateable part of estate duty leviable in respect of the overseas estates under the law of Great Britain, and any interest payable in respect of such duty as was attributable to the said legacies respectively in due course of administration pursuant to clause 5 of the will; (4) that the rateable part of the duty must be borne by the beneficial interests under clause 4, and secondly, that the capital amount of the fund to be set aside under clause 4 of the will should be reduced in like manner with the other pecuniary legacies, and the income of the reduced fund paid to the defendant Winifred Birtwell.

[His Lordship then heard argument on questions 5 and 6.]

DANCKWERTS J. Question 5 seems to me to be covered by the statement of Jenkins L.J. in *In re Goetze*,[30] where he says[31]: "It was not, I think, disputed that if there had been no special "directions at all in the will concerning death duties, so that each "of the pecuniary legacies and annuities had to bear its due pro-"portion of the United Kingdom estate duty attributable to the "Canadian estate" which is the situation in the present case, "the credit against such United Kingdom estate duty secured "under article 5 of the Double Taxation Order by payment out of "each pecuniary legacy or annuity of its due proportion of the "Canadian succession duty would have enured for the benefit of "the pecuniary legatee or annuitant concerned (which appears "to have been the effect of the decision in the second judgment in "*In re Cunliffe-Owen*)."[32] That would seem to me to apply in the present case. I answer question 5 in the alternative, that the credits in the case of all four duties enure for the benefit of the persons by whom the British estate duty leviable in respect of either of those duties falls to be borne rateably according to the incidence upon those persons of the British estate duty.

Question 6 relates to the amount of Ontario succession duty which is allowable by the Inland Revenue in respect of estate duty payable in England, as if it were a debt deductible from the property in Ontario, and that became valued for the purposes of estate duty. The question is, who gets the benefit of that deduction to some extent of estate duty.

The matter seems to have been dealt with by Wynn-Parry J. in *In re Cunliffe-Owen*,[33] where he said[34]: "The only other duty "in respect of which I heard argument was South African succes-"sion duty. The position as regards this duty is different from "that as regards Canadian succession duty, in that there is no "double taxation relief agreement covering South African "succession duty." In the present case that is the position as regards the Ontario duty. "Nevertheless, the Inland Revenue, "by way of concession, allow the amount exigible in respect of "South African succession duty to be deducted from the value

[30] [1953] Ch. 96.
[31] Ibid. 109, 110.
[32] [1951] Ch. 964.
[33] Ibid.
[34] Ibid. 978.

" of the South African personalty; that is, they allow that duty " to be treated as a debt. According to the expert evidence, " South African succession duty assessed in respect of any succes- " sion is payable by the successor, and if paid by the executors is " recoverable by them from the successor. No part of the duty is " payable ultimately out of the residuary estate. The duty is " assessed at rates varying with the relationship of the successor " to the testator. The question therefore arises how the amount " of South African succession duty allowed by way of the conces- " sion to which I have referred should be apportioned. In my " judgment, the same reasoning should apply as in the case of " the credit given in respect of Canadian succession duty. Mr. " Comber will be entitled to share in the amount of such conces- " sion on a similar formula to that which I have already indicated, " and the residuary legatees will be entitled to have the remainder " apportioned between them according to their respective " interests in the residuary estate." It seems to me that the effect of that is, as contended for by Mr. Cohen, consistent with the principle adopted in the present case; in other words, those who have to bear the proportion of the burden of the British estate duty should also receive the benefit of the proportion of the concession made by the Commissioners of Inland Revenue.

[Counsel then argued the question relating to the direction as to investments in clause 5 (b) of the will, which was raised by question 8 of the summons.]

DANCKWERTS J. In this case the question that I have to decide arises from the direction contained in clause 5 (b) of the will: " To invest the residue of such moneys in South African " trustee securities only with power to vary such investments for " others of a like nature " as respects the trust fund. It appears that there are a very limited number of South African loans and stocks which come within investment allowed by the Trustee Act, 1925, which in England governs the investment of trust funds; but in South Africa there is no corresponding statutory provision defining in what funds trustees may invest. It is stated in this way in the affidavit sworn on behalf of the plaintiff bank: " The plaintiff company are advised by their correspondents in " the Union of South Africa that there is no statutory provision " in force in that country governing the investment of trust " money and that in practice subject to the express provisions " of the trust instrument and to any equitable principles affecting " the particular case the following classes of securities are " regarded as suitable for such investment, namely, (i) local issues " of Government and leading municipal stocks, (ii) first mortgage " bonds on property in the Union, (iii) stocks of certain public " utility corporations in the Union, and (iv) certain landed " property in the Union "

It would seem to me absurd to think that the testator should have intended to limit the investments by his trustees to those

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very limited investments in South Africa which come within section 1 of the Trustee Act, 1925, having particular regard to the fact that he has directed in clause 8 that his residuary trust fund shall be transferred when the administration is complete to the Standard Bank of South Africa at its offices in South Africa, and having regard also to the fact that the beneficiaries all reside in South Africa. Some help may be gained from the gift to the annuitant who resides in England, in which case the fund is directed to be appropriated in English investments. Accordingly, I come to the conclusion that the wider meaning must be given to the phrase used by the testator in clause 5 (b), and that meaning must be to invest in such forms of investment as are regarded by the courts of South Africa or any province thereof as suitable for investments of trust funds.

Declaration accordingly.

Solicitors: *Woodcock, Ryland & Co. for Preston & Redman, Bournemouth; Bentleys, Stokes & Lowless; Theodore Goddard & Co.*

I. G. R. M.

[CHANCERY DIVISION.]

1958
Oct. 8.

Harman J.

PHILLIPS *v.* PRICE.

[1957 P. 2158.]

Landlord and Tenant — Repairs — Act of 1938 *— Leave to proceed for possession—Breaches of covenants to repair—Application by lessor for leave to proceed in claims for forfeiture and damages—Matters to be proved to obtain such leave—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146 (1) (3)*—Leasehold Property (Repairs) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1 (5) (*as amended by the Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 51).

Statute—Construction—Alternative or collective provisions—Proof of "a, b or c"—Whether a and b collective or alternative—Meaning of "or"—Leasehold Property (Repairs) Act, 1938, *s.* 1 (5).

A., the first respondent, in 1937 acquired a lease for 80 years from 1882 of a slum tenement in Southwark, and in February, 1956, assigned it to the second respondents, the C. Co., of which he was secretary. The lease contained a covenant by the lessee to repair and a proviso for re-entry on breach of any covenant. In 1954 P. bought the reversion for £275 and in 1955 he served A. with a notice to repair pursuant to section 146 of the Law of Property Act, 1925,[1]

[Reported by MISS MARGARET THOMAS, Barrister-at-Law.]

[1] Law of Property Act, 1925, s. 146: "(1) A right of re-entry or "forfeiture under any proviso or stipu- "lation in a lease for a breach of any "covenant or condition in the lease "shall not be enforceable by action "or otherwise, unless and until the "lessor serves on the lessee a notice— "(*a*) specifying the particular breach "complained of; and (*b*) if the breach "is capable of remedy, requiring the "lessee to remedy the breach; and "(*c*) in any case, requiring the lessee "to make compensation in money for

to which A. replied with a counter-notice under section 1 (1) of the Leasehold Property (Repairs) Act, 1938.[2] In October, 1956, P. served a similar notice upon the C. Co., to which they replied with a counter-notice, and they executed a few minor repairs. In April, 1957, the London County Council declared the area in which the property was situated to be a clearance area, and in November followed this by a compulsory purchase order which was awaiting confirmation at the date of the hearing. P. applied to the court for leave to bring proceedings against the C. Co. for possession of the property.

The evidence was that the premises were antiquated and undesirable by modern standards, but that the respondents had allowed them, in breach of the repairing covenants, to fall into a very bad state of disrepair.

On a preliminary question whether, in order to obtain leave to proceed, a lessor had to establish to the satisfaction of the court the requirements of all the paragraphs of section 1 (5) of the Act of 1938, or whether those paragraphs were alternative:—

Held, that the paragraphs were alternatives, so that if a lessor could establish one of them to the satisfaction of the court, there was jurisdiction to grant leave to proceed.

On the facts of the case:—

Held, (1) that there was nothing in the facts, including the existence of the compulsory purchase order, to justify the court in holding that there were any "special circumstances" under

"the breach; and the lessee fails, "within a reasonable time thereafter, "to remedy the breach, if it is capable "of remedy, and to make reasonable "compensation in money, to the satisfaction of the lessor, for the breach. " . . .

"(3) A lessor shall be entitled to "recover as a debt due to him from a "lessee, and in addition to damages "(if any), all reasonable costs and "expenses properly incurred by the "lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach "giving rise to a right of re-entry or "forfeiture which, at the request of "the lessee, is waived by the lessor, "or from which the lessee is relieved, "under the provisions of this Act."

[2] Leasehold Property (Repairs) Act, 1938, as amended by the Landlord and Tenant Act, 1954, s. 51: "(1) Where a lessor serves on a "lessee under section 146 (1) of the "Law of Property Act, 1925, a notice "that relates to a breach of a covenant or agreement to keep or put in "repair during the currency of the "lease all or any of the property "comprised in the lease, and at the "date of the service of the notice "three years or more of the term of "the lease remain unexpired, the "lessee may within twenty-eight days "from that date serve on the lessor a "counter-notice to the effect that he "claims the benefit of this Act. . . .

"(5) Leave for the purposes of this "section shall not be given unless the "lessor proves—(*a*) that the immediate remedying of the breach in "question is requisite for preventing "substantial diminution in the value "of his reversion, or that the value "thereof has been substantially "diminished by the breach; (*b*) that "the immediate remedying of the "breach is required for giving effect "in relation to the premises to the "purposes of any enactment, or of "any byelaw or other provision "having effect under an enactment, "or for giving effect to any order of "a court or requirement of any "authority under any enactment or "any such byelaw or other provision "as aforesaid; (*c*) in a case in which "the lessee is not in occupation of the "whole of the premises as respects "which the covenant or agreement is "proposed to be enforced, that the "immediate remedying of the breach "is required in the interests of the "occupier of those premises or of part "thereof; (*d*) that the breach can be "immediately remedied at an expense "that is relatively small in comparison with the much greater expense "that would probably be occasioned "by postponement of the necessary "work; or (*e*) special circumstances "which in the opinion of the court, "render it just and equitable that "leave should be given."

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paragraph (*e*) in the case of such a speculative purchase of bad property; (2) that the breaches of the repairing covenants were such as to establish a case under paragraphs (*a*) and (*c*); (3) that in all the circumstances, it was right that the discretion of the court should be exercised to grant the lessor the right to proceed, as the breaches of the repairing covenants had damaged the value of the reversion, and it might be proved in the ensuing action that such breaches would substantially affect the amount paid to the lessor under the compulsory purchase order.

ADJOURNED SUMMONS.

The subject-matter of the application, a tenement property consisting of 12 flats and known as Garfield House, Mardyke Street, Southwark, was subject to a lease made on May 1, 1883, granted for a term of 80 years from Michaelmas, 1882, at a yearly rent of £26. The lease contained a covenant by the lessee to repair, and a proviso for re-entry on breach of any covenant. The lease was assigned to the first respondent, Arthur Roland Price, on August 23, 1937, and he assigned it to the second respondents, the present lessees, Crosslet Properties Ltd., of which he was secretary, on February 21, 1956. On November 12, 1954, when the lease had eight years to run, the freehold was conveyed to the present lessor, the applicant, Sampson Phillips, for £275. Garfield House had since 1936 been slum property and was in a slum area.

The lessor instructed surveyors who drew up a heavy schedule of dilapidations amounting to about £5,000, and on April 1, 1955, his solicitors served a notice of repair pursuant to section 146 of the Law of Property Act, 1925, upon Price, who replied with a counter-notice under section 1 of the Leasehold Property (Repairs) Act, 1938, claiming the benefit of that Act. On March 10, 1956, the lessor received notice of the assignment by Price to the present lessees, and on October 15, 1956, he served a notice of dilapidations on them, to which they replied with a counter-notice. The lessor's surveyor found, when he visited the premises in May, 1957, that only an insignificant part of the repairs had been done by the lessees, while the sublessees had done some minor repairs at their own expense. The company continued to collect the rents of the 12 flats, which were between £20 and £40 a year. The building still remained dilapidated, damp, and insanitary, but no sanitary notices were ever received. At the date when the lessor acquired the freehold it was known that the London County Council were proposing to develop the area. In April, 1957, they declared it to be a clearance area, and on November 20, 1957, this was followed by a compulsory purchase order pursuant to section 43 of the Housing Act, 1957. The order at the date of the hearing was awaiting confirmation by the Minister.

The lessor now applied to the court for leave to bring proceedings against the lessees for the possession of the property, and against the lessees and their assignor for damages for breaches of covenant to repair, and claimed the benefit of section 146 (3) of the Law of Property Act, 1925, in respect of his costs and expenses.

The respondents raised a preliminary point, that a lessor, in order to obtain leave to bring an action under section 146 of the Act of 1925, must satisfy the court under all the sub-paragraphs of section 1 (5) of the Act of 1938.

D. Gidley Scott for the applicant.
F. Bower Alcock for the respondents.

The following cases were cited in argument: *Creery* v. *Summersell* [3]; *Smiley* v. *Townshend* [4]; *Espir* v. *Basil Street Hotel Ltd.* [5]

HARMAN J. This is a preliminary point of law concerned with what is required of the landlord to bring himself within the bounds of this, I must say, strange statute. The Act was passed in 1938, and was called the Leasehold Property (Repairs) Act. Its intention was to restrict the rights of a landlord to enforce the covenants by the lessee in the lease, primarily obligations to repair, but not solely, by any means. It provides that where the usual notice is served by a landlord under section 146 of the Law of Property Act, 1925—the notice which is a prerequisite in nearly every case to an action for forfeiture—then the lessee may serve a counter-notice that he desires to obtain the benefit of this Act. This was restricted in the original Act to a period of more than five years before the end of the term, but was cut down in 1954 by the Landlord and Tenant Act to three years. It applied originally to what were called "long leases," that is to say, 21 years or more, that being apparently the legislature's view of a long lease. That was cut down to seven years, so that now, if there be more than three years to run of a total term of seven years, and the rateable value be limited as the Act provides, the landlord has to get over the extremely high fences which this Act sets up before he may even start to bring his action to enforce his rights.

It is not for me to comment on the justice of that. What I am confronted with is the conditions on which leave may be granted or withheld. That, again, is couched in negative terms. It does not permit the court to give leave wherever it finds certain circumstances. It says: "Leave shall not be given unless"—and the burden of proof is put on the landlord. Section 1 (5) reads: "unless the lessor proves" and then there are set out paragraphs (*a*), (*b*), (*c*), (*d*), (*e*). Between (*d*) and (*e*) there is the word "or"; otherwise (*a*), (*b*), (*c*), (*d*) are merely separated by a semi-colon in each case. Thus, leave shall not be given unless the landlord proves (*a*) that so-and-so, (*b*) that the other, (*c*) that the third, (*d*) that the fourth, or (*e*) special circumstances. In my opinion, those special circumstances are a general alternative to the rest of the section.

[3] [1949] Ch. 751.
[4] [1950] 2 K.B. 311; 66 T.L.R. (Pt. 1) 546; [1950] 1 All E.R. 530.
[5] [1936] 3 All E.R. 91.

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It is said with a great deal of cogency by Mr. Alcock that (*a*), (*b*), (*c*), (*d*) are not couched in any alternative form at all; and that it is necessary, if you cannot get yourself within the special circumstances set out in (*e*), for you to prove the whole of (*a*), (*b*), (*c*), (*d*), because there is no alternative word between them. This, I must say, is a blot on the draftsmanship. I should have thought that it was of the first necessity that the legislature should make it plain whether the paragraphs are alternative or collective. It has not done so. It has put in one alternative at the end of the fourth of the paragraphs; that makes the fifth either alternative to the fourth, or alternative to all the preceding ones.

It was also the alternative suggestion, in this state of things, that as there is no "or," and as the prohibition is on the landlord "unless he proves" as follows, the right view is that he must prove them all, and to this view I was at one time inclined. But I have changed my mind, because when I look at the section I find that (*a*), for instance, and (*b*) contain within themselves alternatives, and each one of them, I think, is intended to provide a category in itself; that is to say, the landlord must prove either what is in (*a*) or what is in (*b*) or what is in (*c*) or what is in (*d*). The court is not bound even then to give him any relief, but it cannot give him any "unless he proves," whatever that may mean (and that I have not yet considered), the matters stated in one at least of the sub-paragraphs.

It seems to me that the conclusive argument about the alternative view is to be found in (*b*), because there you have to bring yourself within statutory requirements, and it would follow that where no statute came into the picture, a landlord could never get any leave to enforce his rights; and that seems to me to be so unjust that it is an intention not to be imputed to the legislature unless I must. I do not think I need, and I am not inclined to do so.

Accordingly, I hold that it is enough for the landlord to bring himself within (*a*) or (*b*) or (*c*) or (*d*) or (*e*), and that if he does so, it will then be for me to consider whether I ought to give him leave to start proceedings.

Consideration was then given to the facts of the case.

HARMAN J. This is an originating summons under the Leasehold Property (Repairs) Act, 1938. [His Lordship stated the facts substantially as set out above, and continued:] I have already decided that what has to be shown by the applicant is that one or other of the matters set out in section 1 (5) of the Act is present here; and the applicant says that he is in a position to prove several of them. First, he says, as regards the last paragraph, that there are special circumstances here which render it just and equitable that he should have leave. The special circumstances put forward are, first, the existence of

the compulsory purchase order. The effect of that, if confirmed, would be that the property will be acquired by the London County Council, who will have to pay for it the value of the site only as a cleared site, a value which appears to be somewhere in the region of £250. It is said that that state of things has been brought about by the default of the respondents, and that, therefore, it is just and equitable that the applicant should exercise his rights, because otherwise he will not even be able to save out of the wreck the whole of the compensation which will become payable. The objection taken to that is that anyone buying property of this sort must contemplate the possibility of clearance orders and compulsory purchase, and that is one of the risks that a speculator takes. In my judgment; that point is a good one. I do not think that is a special circumstance.

Then it is said that it was a special circumstance that the first respondent had assigned to this company obviously with a view to avoiding liability so far as he could. It is well known that people of this sort always resort to this kind of expedient, and I do not think that is a special circumstance at all. If the only question before me were whether it was just and equitable that the action should be brought, I should say that it was, but that is not what the section says. I do not see any special circumstances under (*c*) here, and the applicant, therefore, must rely on (*a*), (*b*), (*c*) or (*d*). He does not say that he can rely on (*d*), so that leaves (*a*), (*b*) and (*c*).

The part of (*a*) relied on is that the value of the reversion has been substantially diminished by the breach. That is one thing. Under (*b*) it is said that the breach ought to be remedied in order to satisfy the various statutory provisions and regulations in connexion with repair, maintenance or the sanitary condition of houses. Thirdly, it is said, under (*c*), that it is in the interests of the occupiers that the breach should be immediately remedied.

As to (*a*), I am of opinion that the applicant proves his case. It is admitted that there have been wholesale breaches of the repairing covenants; the applicant says £5,000 worth—even the respondents agree £2,500 worth. No attempt has been made to keep this property in the state in which the tenant is bound to keep it. The first respondent has simply taken his rent and done as little as he can. It seems to me clear that this property in good repair must be worth more than in its present state. But it is said that this is a property on which a compulsory purchase order has been made, and site value only will be paid, and that the same thing would have happened if the property had been kept in apple-pie order throughout the term of the lease. I do not accept that at all. It seems to me ridiculous to say that it would have made no difference if the London County Council surveyors had come along and found this property was in first-class repair, even though the other properties in the road were not. In that case, two things might have happened: either it might have been excluded from the clearance area, in which case market value

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would have been paid for it, or it might have been entitled to some ex gratia payment so-called. In my view, the words "unless he proves" cannot mean more than that the court, on balance of the evidence, is persuaded, and would accept it as proved in a civil action; and I prefer the evidence of Davis, the applicant's surveyor, on this part of the case to that of Stimson, the respondents' surveyor, who merely says, in a vague and completely general way: "I am of opinion that even if Garfield "House had been maintained in proper condition to the fullest "extent required by the covenants of the lease, the bad arrange- "ment and age of the property would have rendered it just "as unfit for human habitation as it is now." The age of the property has nothing to do with it being unfit for human habitation. If one looks at section 4 of the Housing Act, 1957, which defines what is to be looked at when considering fitness for human habitation, one does not find anything about age. Nor, indeed, does one find anything about bad arrangement. Bad arrangement can be made a reason for making a compulsory purchase order, and declaring the property to be part of a clearance area, apart from the conditions set out in section 4 (1) of the Act of 1957. The heading of the conditions in section 4 (1) is "Repair," and I cannot think that that is the principal matter when this property is said to be in an insanitary condition, damp, ill-ventilated, and with everything wrong with it, because the covenants in the lease have not been observed. That is the evidence of Davis, and a mere ex cathedra statement on the other side that bad arrangement would have produced the same effect does not seem to me to carry much weight.

Davis's evidence was that these were very bad flats. They were built in 1882, when ideas about housing were very different from what they are today. They have no bathroom, they have no larder, but otherwise they seem to me, on his evidence, quite adequate kind of tenements. I cannot believe that the absence of a bathroom and the absence of a ventilated larder alone are sufficient to induce local authorities in these days to declare a flat unfit for human habitation. They are undesirable features, no doubt, and not in accordance with modern practice, but they are features which exist in the vast majority of houses in this country, I venture to say.

Therefore, it seems to me that the applicant has succeeded in proving that which is required under the first sub-paragraph.

When I look at (*b*), that depends on a very general statement by Davis that many of the details in his schedule of dilapidations ought to be done in order to give effect to the provisions of the Public Health (London) Act, 1936. But he does not condescend to any detail, or to anything more than a very vague statement about that, and I do not think I ought to take any notice of such a statement, especially having regard to the fact that if there is no immediate remedying of the breach, that no doubt will go on year after year; and so far as I know on the evidence before me,

those who have the duty of enforcement of the byelaws have not complained. Therefore, I do not think that the applicant satisfies (*b*).

As to (*c*), again the matter depends on a statement made by Davis. He says that it would be in the interests of the occupiers that these breaches should be remedied. True again, that is only a rather vague statement; but it appears to me that the thing speaks for itself. Quite clearly, it is to the advantage of the occupiers that breaches of this sort should be remedied—matters such as leakage from water closets in a flat on one floor flowing down into the flat on the next floor, and so forth. A standard of repair far higher would clearly be in the interests of the occupiers, that is to say, of the 12 tenants of the 12 rent-restricted flats. Consequently, I think that (*c*) also is satisfied.

If that is so, then I have a discretion—I am not bound—to give the landlord leave to sue, a discretion which entitles me to give him leave if I think fit; and, in my judgment, he certainly ought to be given leave. After all, the lessee originally covenanted to do all these things, and got possession of the property upon that footing, and exacted the rack-rent, paying a ground rent and electing to perform his covenanted obligations. Why should the landlord not be entitled to his covenanted rights, whatever they are, because the statute passed with a view to preventing some oppression, which is not clear to me, says that certain things must be proved to the court before such an action is begun? If they are proved, I cannot see why I should interfere further with the freedom of contract which landlords, to some small extent, still do preserve.

Then it is said that there is no damage to the reversion because nobody supposes that if the landlord receives a sum of money, he would apply it to the doing of these repairs. Of course he will not, but under a compulsory purchase order the whole property is going to be swept away. But the question at issue in an action of this sort is the damage to the reversion; and the damage to the reversion which, in my judgment, has to be proved is that there would be a substantial difference between what the London County Council may be made to pay for the property, or the site as it is, and as it ought to be. How much that may be, I have no idea, and I do not propose to interfere with the trial judge by suggesting it. Consequently, I think that it is not true to say that there is no damage to the reversion.

Lastly, it is said that there is a waiver of the forfeiture by acceptances of rent. That does not seem to me to have anything to do with me on this application, and I say nothing about waiver or no waiver. The Act of 1938, so far as I can see, says nothing about forfeiture; it only speaks about damages; and I cannot feel that the fact that the forfeiture part of the action might fail against the second respondent is material. The applicant might nevertheless recover in respect of breaches from the first respondent or from the second respondent. The reversion has been

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damaged prima facie anyhow, notwithstanding (if it be the fact) that the landlord has put himself out of his right to have a forfeiture for the continuing breaches which he has proved. So I shall leave that question to be decided in the action. I make no prophecy at all whether the applicant will be successful. But the applicant having, as I say, satisfied the burden which the 1938 statute puts upon him, I do not see why he should not be free, if he chooses, to put his fortunes to the test.

Consequently, I propose to make a declaration that the applicant shall have leave to proceed, and also I shall declare that the applicant shall be entitled to such benefit from subsection (3) of section 146 of the Law of Property Act as may be decided by the judge at the trial of the suit, that being also a requirement of the Act of 1938.

As to the costs, I shall say that the applicant shall have the costs of his application as though they were his costs in the action; that is to say, if he succeeds in the action, he will get the costs of this application also. If he does not succeed in the action, he will not have to pay any, but he will not get any. This being really in the nature of an interlocutory application, that seems to me to be the right course.

Declaration accordingly.

Solicitors: *Kingsley Wood & Co.; Bonwick & Co.*

[COURT OF APPEAL.]

C. A.

1958
Oct. 6, 7.

Lord Evershed M.R., Sellers and Pearce L.JJ.

REGINA *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* DE DEMKO.

Court of Appeal — Jurisdiction — Criminal cause or matter — Fugitive offender—Appeal against refusal to discharge—Jurisdiction as "superior court"—Whether appellate or original—Fugitive Offenders Act, 1881 (44 *&* 45 *Vict. c.* 69), *ss.* 10, 39—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31.

An application for a writ of habeas corpus and an application for an order granting relief pursuant to section 10 of the Fugitive Offenders Act, 1881,[1] were both refused by the Divisional Court of

[1] Fugitive Offenders Act, 1881, s. 10: "Where it is made to appear "to a superior court that by reason "of the trivial nature of the case, or "by reason of the application for the "return of a fugitive not being made "in good faith in the interests of "justice or otherwise, it would, "having regard to the distance, to "the facilities for communication, and "to all the circumstances of the case, "be unjust or oppressive or too severe "a punishment to return the fugitive "either at all or until the expiration "of a certain period, such court may "discharge the fugitive, either absolutely or on bail, or order that he "shall not be returned until after the "expiration of the period named in "the order, or may make such other

the Queen's Bench Division, and the applicant appealed against the refusal of the order under the Act of 1881:—

Held, that as in habeas corpus proceedings the Court of Appeal has no appellate jurisdiction in cases involving a criminal cause or matter, so under the Fugitive Offenders Act, 1881, it has no such jurisdiction; the jurisdiction conferred by section 39 of the Act of 1881 was original and not appellate, accordingly the court could not entertain the appeal.

Rex v. *Governor of Brixton Prison, Ex parte Savarkar* [1910] 2 K.B. 1056; 26 T.L.R. 561 (followed in *In re Henderson* [1950] 1 All E.R. 283) applied.

APPEAL from Divisional Court (Devlin, Donovan and Ashworth JJ.).

On February 19, 1958, Baron Kalman de Demko (hereinafter called the "applicant"), then resident in the United Kingdom, was arrested on a warrant issued at Johannesburg, South Africa, setting out a number of charges of fraud and theft which included one that he had converted to his own use a loan of £6,500 made in March, 1951, by a Mrs. Smith to a company known as Dawson's Transport (Tvl.) (Ppty.) Ltd. On June 17, 1958, the applicant was brought before the magistrate at Bow Street, Sir Lawrence Dunne, and a prima facie case was made against him. The magistrate committed the applicant to prison to await his return to South Africa. Application was made for leave to issue a writ of habeas corpus ad subjiciendum addressed to the Governor of Brixton Prison, and for an order granting relief pursuant to the Fugitive Offenders Act, 1881, section 10. On July 14, 1958, the Divisional Court of the Queen's Bench Division of the High Court made an order refusing both applications. The applicant appealed against the refusal to grant relief under section 10 of the Act of 1881. A preliminary point of law was taken by Sir Harry Hylton-Foster Q.C., S.-G., for the Governor of Brixton Prison that the Court of Appeal had no jurisdiction to entertain the appeal.

Sir Harry Hylton-Foster Q.C., S.-G., Rodger Winn and *Basil Wigoder* for H.M. Secretary of State for Home Affairs and the Governor of Brixton Prison.

F. H. Lawton Q.C. and *P. A. W. Merriton* for the applicant.

J. C. Phipps for the Government of South Africa.

In addition to the cases referred to in the judgments, the following were cited in argument: *Young* v. *Bristol Aeroplane Co. Ltd.*[2]; *Morelle* v. *Wakeling*[3]; *In re Carroll*[4]; *Smith* v. *Williams*.[5]

"order in the premises as to the court "seems just."

S. 39: "The expression 'superior "'court' means: (1) In England, "Her Majesty's Court of Appeal and "High Court of Justice; and (2) In "Scotland, the High Court of Justici-"ary . . ."

[2] [1946] A.C. 163; 62 T.L.R. 99; [1946] 1 All E.R. 98.

[3] [1955] 2 Q.B. 379; [1955] 2 W.L.R. 672; [1955] 1 All E.R. 708.

[4] [1931] 1 K.B. 104; 47 T.L.R. 20.

[5] [1922] K.B. 158; 38 T.L.R. 116.

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LORD EVERSHED M.R. This is an appeal against an order made by the Divisional Court of the Queen's Bench Division on July 14, 1958. So far as relevant, that order reads: "Upon the application of Baron Kalman de Demko for leave to issue a writ of habeas corpus ad subjiciendum and for relief pursuant to the Fugitive Offenders Act, section 10," and after hearing counsel and reading evidence, "No order is made pursuant to the said Act and the application that a writ of habeas corpus ad subjiciendum do issue is hereby refused."

My reading of the order sufficiently indicates the nature of the application. And it is to be noted that the greater part of the judgment of Devlin J. (which was the leading judgment in the Queen's Bench Division) dealt with and was related to the application under the Fugitive Offenders Act, 1881. I need not take time to read the judgment; but it appears from it that the applicant had been charged with certain offences which the judge said (as to one of them) could not in any circumstances be suggested as trivial; and he, therefore, concluded that it would not be unjust or oppressive that the applicant should be required to return to South Africa in order to stand his trial; nor did the judge think that the lapse of time since the alleged offences substantially altered the result.

The notice of appeal is dated July 29, 1958; and we agreed yesterday that we should expedite the appeal since it was a matter involving the liberty of the individual. Mr. Lawton, for the applicant, has not pressed that part of his original application which asked for leave to issue a writ of habeas corpus. He accepts that it must be taken now as clearly decided, by authorities binding upon this court (see, for example, *Ex parte Woodhall* [1] and *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government* [2]), that the widest construction will be given to the formula in the Judicature Acts, "criminal cause or matter"; with the result that section 31 of the Judicature Act, 1925,[3] makes it plain that we have in this court no jurisdiction to entertain an appeal from a decision of the Divisional Court refusing leave to issue a writ of habeas corpus. But Mr. Lawton pressed his application under section 10 of the Fugitive Offenders Act, 1881, which (as he rightly observes) has not been the subject of any direct authority binding upon this court. But the Solicitor-General, for the governor of Brixton Prison, has taken the preliminary objection that the same section—section 31 (1) of the Judicature Act, 1925—applies to an appeal, or a purported appeal, under the Fugitive Offenders Act, 1881, so that we in this court have no more jurisdiction to entertain such an appeal than we

[1] (1888) 20 Q.B.D. 832.
[2] [1943] A.C. 147; [1942] 2 All E.R. 381.
[3] Supreme Court of Judicature (Consolidation) Act, 1925, s. 31: "(1) No appeal shall lie (*a*) except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any criminal cause or matter."

have to entertain an appeal in relation to the habeas corpus application.

In my judgment, the preliminary objection is well-founded. I turn first to the Fugitive Offenders Act, 1881, itself. It is not in doubt that the alleged offences with which the applicant has been charged are within the scope of the Act and form the subject of the phrase a " criminal cause or matter." [His Lordship read section 10 and the definition of " superior court " in section 39 of the Act, and continued:]

The argument of Mr. Lawton is, briefly (and I hope I do it justice), as follows: Since by the express language of the definition section the Court of Appeal is included in the phrase " superior court " and, therefore, given jurisdiction, that jurisdiction must include the function which that court normally performs—namely, the function of hearing appeals. In support of that general proposition, Mr. Lawton referred (for example) to the language of Lord Parker of Waddington in *National Telephone Co. Ltd.* v. *Postmaster-General*,[4] where he said: " Where " by statute matters are referred to the determination of a court " of record with no further provision, the necessary implication is, " I think, that the court will determine the matters, as a court. Its " jurisdiction is enlarged, but all the incidents of such jurisdiction, " including the right of appeal from its decision, remain the " same."

As I have referred to that passage, I should add, in regard to it, that the real question before the House in the *National Telephone Co.* case[4] was whether the Railway and Canal Commission —which had been given jurisdiction as regards certain matters arising under the Telegraph (Arbitration) Act, 1909—was to act in regard to those matters as an arbitrator or as a court; and the House decided in favour of the latter view, with the consequence that, in the ordinary course, an appeal lay from the decision of the commission.

To revert to Mr. Lawton's argument: he added the further, by no means insignificant, point that the original jurisdiction of the creature of statute, namely, the Court of Appeal, is (to say the least of it) of an extremely limited character. (See, for example, the notes in the Annual Practice, 1958, p. 1651, to R.S.C., Ord. 58, r. 1.)

If sections 10 and 39 of the Fugitive Offenders Act, 1881, stood alone, and the matter were entirely res integra, I think that there would be great force in the submissions of Mr. Lawton. But if that were so—if, that is to say, he were right in saying that the reference to the Court of Appeal meant, by necessary inference, that it was to exercise in regard to these matters its ordinary appellate jurisdiction—then one would not suppose that the Court of Appeal had original jurisdiction in this kind of matter also.

I have said that there is no direct authority binding upon this

[4] [1913] A.C. 546, 562.

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court to the effect that this court has no appellate jurisdiction in these matters. But there is direct authority for the view that this court has an original jurisdiction. That authority (which has been much considered in the present hearing) is *Rex v. Governor of Brixton Prison, Ex parte Savarkar* [5]; and as regards this matter of original jurisdiction it was followed and treated as authoritative in *In re Henderson.* [6]

In *Ex parte Savarkar,* [7] an application had been made to the Divisional Court (as in the present case) both for leave to issue a writ of habeas corpus and also under section 10 of the Fugitive Offenders Act, 1881, the prisoner in question having been committed to prison under the latter Act. The Divisional Court had rejected the application; but (as appears clearly from the report) the order in fact drawn up was limited to a refusal to give leave to issue the writ of habeas corpus: it was wholly silent as to the Fugitive Offenders Act application. Savarkar having appealed, Sir Rufus Isaacs, S.-G., took the preliminary objection (in much the same way as the present Solicitor-General has done in this case) that this court had no jurisdiction to entertain the appeal or the application at all. His argument ended as follows [8]: "The present case, it is true, arises under the Fugitive Offenders "Act, 1881, under which the appellant has been committed to "prison in this country to take his trial in another part of His "Majesty's dominions, but no trace is to be found in that Act "of an appellate jurisdiction being given to this court, and the "principle of the decision in *ex parte Woodhall* [9] is decisive of "the present case." His argument was countered by Mr. Powell, for the prisoner; and, as reported, his argument closely reflects the argument of Mr. Lawton as I have tried to summarize it [10]: "By sections 10 and 35 certain powers are given to a 'superior "'court,' which expression is by section 39 defined to mean "'in England, Her Majesty's Court of Appeal and High Court of "'Justice.' It must be inferred from this that it was the "intention of the legislature to confer upon the Court of Appeal "an appellate jurisdiction in the case of applications made under "the Act, as the present application was made; there was no "other reason for including it in the definition of a superior "court." Mr. Powell then, however, concluded by this submission: "It is further submitted that under the Act of 1881 the "Court of Appeal has both an original and an appellate jurisdic-"tion, and, if necessary, the court is asked to hear the application "under the Fugitive Offenders Act, 1881, in the exercise of its "original jurisdiction." This court then, having observed the form of the order which was being appealed from, came to the conclusion that it did not deal at all with the application under the Fugitive Offenders Act, 1881; and, treating it as confined

[5] [1910] 2 K.B. 1056; 26 T.L.R. 561.
[6] [1950] 1 All E.R. 283.
[7] [1910] 2 K.B. 1056.
[8] Ibid. 1061.
[9] 20 Q.B.D. 832.
[10] [1910] 2 K.B. 1056, 1062.

to the habeas corpus part of the case, they then proceeded to dismiss the appeal. Counsel for Savarkar thereupon made an original application to the Court of Appeal, under the Fugitive Offenders Act, 1881; and Sir Rufus Isaacs S.-G. sought (persisting in his preliminary objection) to defeat that by saying that, upon a true construction of the statutes, an application under the Habeas Corpus Acts involved the application under the Fugitive Offenders Act, 1881, so that the latter must be treated as having, sub silentio, been dealt with by the dismissal of the habeas corpus application. Mr. Powell, upon that matter, was not called upon.

The leading judgment was delivered by Vaughan Williams L.J., who said [11]: "I start with the assumption that, under the "Fugitive Offenders Act, 1881, there is concurrent jurisdiction to "deal with such an application in each court which comes within "the definition of a 'superior court' given by the Act, and "therefore we have power to deal with such an application as a "court of first instance. . . . This being so"—that is to say, after referring to the definition giving power to the Court of Appeal to entertain originally the application—"in the absence "of anything to qualify the effect of this provision in the rest of "the Act, it necessarily gives to each of the courts which come "within the category of a 'superior court,' as defined by the "interpretation clause, jurisdiction to deal with such matters on "the same basis, not on the basis that one is a court of first "instance and the other is a Court of Appeal. It appears to me "that it cannot be that the Court of Appeal, having regard to "the provisions of section 47 of the Judicature Act, 1873, was "intended to exercise appellate jurisdiction in respect of matters "arising under an Act dealing entirely with procedure in a "certain class of criminal prosecutions." Later, he said [12]: "The ultimate conclusion at which I arrive is that the applicant "is entitled to make this application to us, first, because an "application such as this may be made to any court which "comes within the definition of a 'superior court' given by the "Fugitive Offenders Act, 1881; and secondly because, assuming "that no such application could be entertained after the matter "had once been adjudicated upon by a superior court, in my "opinion, we must look for such an adjudication in the record of "the court"; and then he points out that the record was silent upon it.

Fletcher Moulton L.J. said [13]: "In the first place I am "satisfied that under sections 10 and 35 of the Fugitive Offenders "Act, 1881, jurisdiction is given to this court to hear an applica-"tion of this kind, and that this jurisdiction is a jurisdiction "concurrent with that of the High Court, both this court and the "High Court being included in the designation 'superior court'

[11] [1910] 2 K.B. 1056, 1069, 1070.
[12] Ibid. 1072.
[13] Ibid. 1073.

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" by virtue of that definition of that expression in section 39 of " the Act "; and Fletcher Moulton L.J. concluded his judgment thus [14]: " Therefore it must be taken that the questions raised " by the present application have not been heard and decided in " proceedings properly raising them before a court of concurrent " jurisdiction; and consequently, without deciding whether, if " they had been so heard and adjudicated upon, it would have " prevented us from hearing this application, it is open to us to " treat the matter as res nova, and not res judicata."

Buckley L.J. had taken a somewhat different view of the construction of the Act—a view more in conformity, it is fair to say, with Mr. Lawton's argument. He concluded his judgment as follows [15]: " There is one other point upon which I wish to say " a word. It is this: it would be another possible objection to " the original motion which, as the result of this judgment, we " are going to hear that, where the Act of 1881 refers to the " ' Court of Appeal ' as a ' superior court,' it means that court " sitting as a Court of Appeal. The learned Solicitor-General has " not thought fit to argue that point. I agree with what Vaughan " Williams L.J. has said to the effect that we must for ourselves " determine that point in order to hear this motion. As my two " brothers think that that point is to be resolved in favour of our " hearing the motion, of course that decides the matter. For my " own part, I have not heard the matter argued, and will only " say that I think it is a question of very considerable difficulty " whether, when this Act speaks of the ' Court of Appeal,' it does " not mean the Court of Appeal sitting as a Court of Appeal. It is " unnecessary for me to say more as to this point, because the " other members of the court do not think that is the meaning. " Under these circumstances I do not think that the preliminary " objection can be upheld."

What, then, so far as is relevant to this appeal, is the result of that case, which, I observe, was decided in 1910 and has not since been the subject of any adverse comment? I think, first, it provides clear authority (and I have already referred to the subsequent case *In re Henderson* [16]) for the view that, on the true construction of the Fugitive Offenders Act, 1881, the Court of Appeal has original jurisdiction to hear an application under section 10. I think it also clear that all three judges thought (to say the least) that it was extremely improbable that, by virtue of the definition section and its operation upon section 10, this court could have both original and appellate jurisdiction. Vaughan Williams L.J. expressly said that in his view it could not have both; and although Fletcher Moulton L.J. reserved the matter, it is, I think, clear enough from Buckley L.J.'s view that he thought that a choice would have to be made between the one and the other, though, if he had been left to himself, his own

[14] [1910] 2 K.B. 1056, 1076.
[15] Ibid. 1079.
[16] [1950] 1 All E.R. 283.

choice would have been by way of a preference contrary to that entertained by his colleagues. Third, I think that the case does contain, though no decision, at least indications which are contrary to the argument of Mr. Lawton; and I have for this purpose been careful to read the arguments of Sir Rufus Isaacs and Mr. Powell at the beginning of the hearing.

I should, therefore, be disposed to think that the proper inferences to be drawn from *Savarkar's* case [17] are such as should guide us to decide the present case in the way which the Solicitor-General has contended. But in any event, given that there is to be taken as conferred by section 10 of the Fugitive Offenders Act, 1881, an original jurisdiction upon this court (as we must assume) then I conclude clearly that we cannot have also appellate jurisdiction.

I base that conclusion, briefly, on these steps. First, it is a necessary premise to Mr. Lawton's argument that, there being no express grant of appellate jurisdiction, we must find it in the inferences to be derived from the definition. In other words, to use Mr. Lawton's language, if one finds jurisdiction given to what is a Court of Appeal then there is pregnant in that conferred jurisdiction the notion of appellate functions. But against that submission one must bear in mind that the Act of 1881 succeeded by eight years the passage of the Supreme Court of Judicature Act, 1873. That was the Act which consolidated the various courts which had up to then been distinct—the Court of Chancery, the Court of Exchequer, the Court of Queen's Bench, and so forth—into a single supreme court, and created, as part of the supreme court, this court, the Court of Appeal.

The jurisdiction and functions of the Court of Appeal are dealt with in the appropriate sections of the Act, of which I can confine myself to a reference to one, namely, section 47, which provides: "The jurisdiction and authorities in relation to questions of law "arising in criminal trials which are now vested in the justices "of either bench and the barons of the Exchequer by" (a certain Act) "shall and may be exercised after the commencement of "this Act by the judges of the High Court of Justice, or five of "them at the least," (which include certain named ones). The section concludes: "The determination of any such question by "the judges of the said High Court in manner aforesaid shall be "final and without appeal; and no appeal shall lie from any "judgment of the said High Court in any criminal cause or "matter, save for some error of law apparent upon the record, as "to which no question shall have been reserved for the considera-"tion of the said judges under the said Act of the eleventh and "twelfth years of Her Majesty's reign."

If that section is borne in mind, it seems to me no longer true to say, necessarily, that a reference to the Court of Appeal in such a context as one finds in the Fugitive Offenders Act, 1881,

[17] [1910] 2 K.B. 1056.

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connotes or carries with it the notion of the exercise of appellate function. The Court of Appeal was a creature of statute then only a few years old; and in the statute which created the Court of Appeal it had been clearly laid down that in regard to criminal causes or matters no appeal should lie to it: it should have no appellate jurisdiction or function.

The matter, however, does not entirely rest there. I think that there are indications supporting that view to be found in the Fugitive Offenders Act, 1881, itself. They may be slight, but they do (as I think) point in the same direction. One is to be derived from section 6 of the Act. That section provides: "Upon "the expiration of 15 days after a fugitive has been committed "to prison to await his return, or if a writ of habeas corpus or "other like process is issued with reference to such fugitive by a "superior court, after the final decision of the court in the "case . . . "; a form of words which (I agree with the Solicitor-General) does not, on the face of it, seem to fit at all readily with the notion that there might be an appeal from one part of the "superior court" to another. And if one looks at the definition itself, it is, if I may repeat it, "'superior court' means, in "England, Her Majesty's Court of Appeal and High Court of "Justice." I should have thought that if it had been intended by this somewhat oblique method to confer upon, or to indicate an appellate jurisdiction in, the Court of Appeal it would have been much more natural to have reversed the order and said "the High "Court of Justice and the Court of Appeal." For what it is worth, it is to be noted that no definite article appears before "High Court." I therefore read the relevant definition of "superior court" as merely synonymous with "the Supreme "Court of Judicature" established by the Act of 1873, and without having any reference in it, implicit or otherwise, to an appellate jurisdiction conferred upon part of that court.

Mr. Lawton did refer to the fact that there is no similar distinction, in the reference to the High Court of Justiciary in Scotland, between the Outer House and the Inner House. I do not, however, think that that matter carries any weight in the context.

Those are the reasons, therefore, which have persuaded me that, apart from any implications of the *Savarkar* case,[18] the right answer is that, given original jurisdiction in this court, we have not got at the same time appellate jurisdiction.

There remains, finally, the Judicature Act, 1925. Mr. Lawton referred first to the language of section 26 of that Act, headed "Jurisdiction of the Court of Appeal." It provides, by subsection (1), "The Court of Appeal shall be a superior court of "record"; and, by subsection (2), "There shall be vested in the "Court of Appeal . . . (*d*) All jurisdiction which, under or by "virtue of any enactment which came into force after the com-"mencement of the Act of 1873 and is not repealed by this Act,

[18] [1910] 2 K.B. 1056.

" was immediately before the commencement of this Act vested " in or capable of being exercised by the Court of Appeal con- " stituted by the Act of 1873." In those words, Mr. Lawton finds secreted (if I may use the word without offence to his argument) a reference to the jurisdiction (he says the appellate jurisdiction) conferred by section 10 of the Fugitive Offenders Act, 1881, which, therefore, is expressly preserved; and he submits that in section 31 (1), which reads: " No appeal shall " lie—(*a*) except as provided by the Criminal Appeal Act, 1907, " or this Act, from any judgment of the High Court in any " criminal cause or matter," the three words " or this Act " refer back to (*d*) so as to preserve the appellate jurisdiction of this court in the Fugitive Offenders Act cases.

The argument is, if I may say so, ingenious, but I find it not persuasive. One has to begin by the consideration that the Judicature Act, 1925, is expressed to be a consolidating Act; and one does not look for substantial changes in the law, or the jurisdiction, in a consolidating Act—and one certainly would not be astute to find them in language so extremely obscure as that which I have read, if it is to be applied for this purpose. Indeed, in remembering that this is a consolidation Act one has also to remember that Parliament must be taken to have been aware of the decisions of the courts in the meantime, and particularly of the decision of *Savarkar's* case [19] in 1910.

I have already indicated that if this argument were to prevail it would appear that the draughtsman had preserved the right in language more obscure and oblique than one would think possible. But in truth the plain language of the section seems to me to be in entire conformity with the argument of the Solicitor-General. The words " or this Act " in section 31 have a context and an application in another section, section 29, of the Act [20] and are not, therefore, left so to speak entirely in the air; and, as I read them according to their ordinary sense, I think that the Act of 1925 rather confirms and supports the implications which I have drawn from the earlier legislation than otherwise.

For these reasons, I think that the preliminary objection here must prevail, and that we must hold in this matter that we have no jurisdiction to entertain an appeal. I would, therefore, on that ground dismiss the appeal.

SELLERS L.J. I, too, would uphold the submission of the Solicitor-General that this court has no jurisdiction to entertain this appeal.

I agree so fully with the reasons given by my Lord that I do not propose to reiterate them in less impelling words of my own.

[19] [1910] 2 K.B. 1056.

[20] Supreme Court of Judicature (Consolidation) Act, 1925, s. 29: " An appeal shall lie to the Court of " Appeal from a conviction on indict- " ment at common law in relation to " the non-repair or obstruction of any " highway, public bridge or navigable " river, in whatever court the indict- " ment is tried, and shall not lie under " the Criminal Appeal Act, 1907."

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Although many attempts have been made to persuade this court that it should hear appeals from decisions in habeas corpus proceedings, they have been consistently refused where the matter has been one of a criminal nature or relating to a criminal cause or matter. This is the first time that an attempt has been made to persuade this court that it has a power and duty to hear an appeal under section 10 of the Fugitive Offenders Act, 1881—and the period of time from 1881 to the present is a considerable one—the first time notwithstanding that in 1910 Buckley L.J. raised the question and expressed his view on the matter as my Lord indicated in his judgment. Forty years after 1910 this court did in fact, in *In re Henderson*,[21] hear a case on an original application to it under section 10. The Fugitive Offenders Act, 1881, and in particular section 39 thereof, makes it clear that this court has some jurisdiction. It has been held in 1910, and acted upon since, that that jurisdiction is an original jurisdiction. Unless it can be said that there can be a dual jurisdiction, both original and appellate, then that decision as far back as 1910 and existing unchallenged up to the present time would establish that the jurisdiction has already been decided to be original and would be binding on this court. On the reasoning which my Lord has advanced, and on the argument on which the Solicitor-General relied, it does not seem possible in my view to say that the jurisdiction given to this court was a dual one. For myself (and this is why I have ventured to make one or two observations in addition to those of my Lord), if the matter were to come afresh I think my view would be that I should agree with the views taken by Vaughan Williams L.J. and Fletcher Moulton L.J., that the proper interpretation of the words which have been relied on does give an original jurisdiction and not an appellate jurisdiction to this court. It may seem, in the light of what had taken place only a few years before—that criminal matters were excluded from the purview of this court—a little strange, perhaps, that such original jurisdiction should be given, but I think it would be even more strange if the statute were to give, in such words as exist for our consideration, an appellate jurisdiction even though limited in those matters which have been so clearly excluded.

I only add those few observations in support of the judgment which my Lord has given.

PEARCE L.J. I agree with all that my Lords have said.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Director of Public Prosecutions; Beach & Beach; Jaques & Co.*

E. D.

[21] [1950] 1 All E.R. 283.

[PROBATE, ETC., DIVISION.]

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Oct. 15.

Lord Merriman P. and Hewson J.

Husband and Wife—Maintenance—Justices—Wilful neglect to maintain —Order against husband under section 43 of the National Assistance Act, 1948—Whether wilful neglect can be found if order obeyed —Husband not informed of wife's need for further support—No element of misconduct—Therefore no wilful neglect to maintain—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4—*National Assistance Act,* 1948 (11 & 12 *Geo.* 6, *c.* 29), *s.* 43.

A husband was ordered to make a weekly payment to his wife under the provisions of section 43 of the National Assistance Act, 1948, which order was punctually obeyed. The wife, whose financial needs were not covered by that order, applied for and was granted an order under the provisions of the Married Women (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had wilfully neglected to provide reasonable maintenance for her. Her financial position had, however, never been brought to the notice of the husband. The husband appealed:—

Held, that since the husband was ignorant of his wife's needs he could not be said to have been guilty of a wilful neglect to maintain her, for such neglect imports an element of misconduct.

Stringer v. *Stringer* [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373; *Starkie* v. *Starkie* (*No. 2*) [1953] 1 W.L.R. 1396; [1953] 2 All E.R. 1255n., 1519; *Pinnick* v. *Pinnick* [1957] 1 W.L.R. 644; [1957] 1 All E.R. 873 applied.

Quaere, whether the punctual payments under the Act of 1948 would of themselves be sufficient to prevent a finding of wilful neglect to maintain.

Morton v. *Morton* [1942] W.N. 43; 58 T.L.R. 158; [1942] 1 All E.R. 273; *Tulip* v. *Tulip* [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91 considered.

APPEAL by a husband against a decision of the justices for the Welshpool petty sessional division of Montgomeryshire, on June 3, 1958, who found that he had wilfully neglected to provide reasonable maintenance for his wife, and made an order for £2 a week.

The husband was permanently disabled 100 per cent. as a result of his war service, and permanently confined to a hospital in Cardiff under the control of the Ministry of Pensions. The wife, resident in Welshpool, was on the evidence in a state of considerable need, and she was relieved by the National Assistance Board under the National Assistance Act, 1948. On October 6, 1953, the Welshpool justices had made an order under section 43 of that Act that the sum of £2 17s. 6d. weekly should be paid by the husband to the wife. That sum was paid by stoppage out of his pension of some £9 a week net payable by the Ministry of Pensions. The payments had been made regularly since the order was made. There was no evidence that the husband had been informed of his wife's circumstances since the order of October, 1953.

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John Perrett appeared for the husband.
G. H. Crispin and *D. R. Stuckey* for the wife.

The cases cited in argument are referred to in the judgment of Lord Merriman P.

LORD MERRIMAN P. stated the facts and continued: It was suggested in the court below that the justices had no jurisdiction to make an order under the Summary Jurisdiction (Married Women) Act, 1895, because of the existence of the order made under the National Assistance Act, 1948. I do not propose to dilate on this point, because it has been abandoned here before us. I merely say this, that there is authority in *Birmingham Union* v. *Timmins* [1] which decides that the existence of an order under the Summary Jurisdiction (Married Women) Act, 1895, did not prevent the guardians from getting an order under the law which prevailed in 1918, corresponding in some respects, but not in all, to the law laid down in the National Assistance Act, 1948. If the point had not been abandoned I should have wished to go into the converse position rather more carefully than we have been able to do on a cursory examination of *Birmingham Union* v. *Timmins*.[1]

That brings me to the real point in this case, and that is that it is suggested that the justices ought not to have found wilful neglect to maintain because of the punctual payments under the order made on October 6, 1953. I think, myself, that that point is not a good point; but I should have been happier about it if I felt that the justices had ever really given their attention to the issues which arise out of the circumstances that this order existed and had been punctually paid. They say in their reasons that they have come to the conclusion that wilful neglect to provide reasonable maintenance was proved because the evidence showed wilful neglect to provide reasonable maintenance, that the complainant was suffering extreme hardship, and "the "evidence shows that though the respondent is unfortunately "completely disabled he is possessed of sufficient means to "maintain the complainant," and "that the weight of the "evidence shows that the respondent being fully maintained "in hospital, without any expense to himself, would not suffer "any hardship in making the payments ordered." I confess that those reasons look to me very much like saying: "The "wife needs the money and the respondent has got it, and there-"fore there is wilful neglect to maintain, and there is wilful "neglect to maintain because he has wilfully neglected to main-"tain her," a state of things about which we spoke rather plainly in *Starkie* v. *Starkie*.[2] The real trouble in this case, in my opinion, is that that really represents what has happened, and the crucial point has not been gone into.

[1] [1918] 2 K.B. 189.

[2] [1953] 1 W.L.R. 1396; [1953] 2 All E.R. 1255n.

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On the authority of the original *Morton* v. *Morton*,[3] which has been followed and approved in the recent case of *Tulip* v. *Tulip*,[4] which deals with the punctual payment of maintenance under an agreement not being conclusive against an allegation of wilful neglect to provide reasonable maintenance, I am prepared, applying that, to assume that the same principle applies to the punctual payments under this order to which I have referred, although there is, of course, an essential difference between payment under an order of the court and that which is merely payable under some agreement; but I think that the same problem still remains, whether the payment thus made is reasonable; and that leads me to what I think is the essential part of the evidence which is lacking in this case.

It is well settled that punctual payment under an agreement (and I think the same thing applies to punctual payment under an order) is of very strong evidential value that the amount so ordered or so agreed is a reasonable amount; but it is not conclusive. Circumstances may have changed, and it is with regard to a case in which circumstances have changed that what was said by Denning L.J. in *National Assistance Board* v. *Parkes*[5] is so important. He says there, in a couple of short sentences, "The principle of *Tulip* v. *Tulip*[6] applies, I think, just as much "when there is an agreement to pay nothing as when a fixed sum "is to be paid; and it overrides anything said previously in *Baker* "v. *Baker*[7] and *Chapman* v. *Chapman*."[8] Pausing there, I ought to say that at this moment my brother and I have reserved a judgment dealing with the validity of that pronouncement,[9] about which, if I may quote myself and Collingwood J., this court has already said something in *Pinnick* v. *Pinnick*.[10] But we are not concerned here with that part of the case. What is important are the words that follow. Denning L.J. went on[11]: "But so long as the husband is ignorant of the new situation he "is under no such duty, and is not guilty of wilful neglect to "maintain her. That is, I think, the effect of the decision in "*Stringer* v. *Stringer*."[12]

Without going into detail, *Stringer* v. *Stringer*[12] is one of the cases in which the decision of the Court of Appeal in *Chapman* v. *Chapman*[13] referred to in the sentence I have just read was

[3] [1942] W.N. 43; 58 T.L.R. 158, 159; [1942] 1 All E.R. 273.

[4] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

[5] [1955] 2 Q.B. 506, 517; [1955] 3 All E.R. 1.

[6] [1951] P. 378.

[7] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.

[8] Unreported (C.A.) April 4, 1951. (Extracts from the judgments are cited in *Stringer* v. *Stringer* [1952] P. 171.)

[9] *Lilley* v. *Lilley*, The Times, October 30, 1958.

[10] [1957] 1 W.L.R. 644; [1957] 1 All E.R. 873.

[11] [1955] 2 Q.B. 506, 517.

[12] [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373.

[13] See n. 8.

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followed, and it happens to contain the explanation of how the unreported case of *Chapman* v. *Chapman* [13] came to be decided, and it is perfectly correct to say it is a case in which stress was laid on the point that the husband had not had it brought to his notice that the circumstances had changed since the original parting. But we have looked in vain in the present case for any evidence whatever that at any time the financial plight of this wife, of which details were given to the justices, had ever in any way, directly or indirectly, been brought to the notice of the husband. After all, it was for the wife to prove her case of wilful neglect to provide reasonable maintenance. In the absence of proof of the important facts that her situation had changed for the worse, that the money which was being provided for her under the order of October, 1953, was not sufficient to meet her needs, and that this was brought home to the knowledge of the husband, in my opinion, on the authority of the passage that I have just read, the wife fails. Likewise, on the line of authorities—*Starkie* v. *Starkie* (*No. 2*) [14] is one of them, but there are many others, for example, *Whittaker* v. *Whittaker*,[15] *Diggins* v. *Diggins*,[16] *Jones* v. *Jones*,[17] and others—which have laid down that the element of misconduct is implicit in the words "wilful neglect to provide reasonable maintenance," I think that this wife has failed to prove her case, from whichever point of view one looks at it.

One must recognize, of course, as a matter of realism that this cannot be the end of the story, but we are only concerned with the case as it stands. We have been asked to refer it back to the justices, but I do not think that in the circumstances that is the proper solution. I think that this wife set out to prove this case in a jurisdiction where she was entitled to prove it, but where it was practically impossible for the husband to attend to give evidence, and I think that she having failed to prove her case the order should be set aside, and I propose that that is what should be done.

HEWSON J. I agree with what Lord Merriman P. has just said. I have in mind what counsel said in his address to the court on behalf of the wife, that since two officials had been investigating the matter on behalf of the wife, and on behalf of various charitable organizations, it must be or might be inferred that the husband had been informed of his wife's condition. I can see no substance in that argument at all, because both of those officials were in Welshpool and not in Cardiff, and were only the local representatives in Welshpool. There is not a shred of evidence that the husband in this case was ever informed of his wife's circumstances, or that the wife ever made them known to

[13] See n. 8.

[14] [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519.

[15] [1939] W.N. 332; 55 T.L.R. 1070; [1939] 3 All E.R. 833.

[16] [1927] P. 88; 43 T.L.R. 37.

[17] (1930) 46 T.L.R. 33.

him. I entirely agree with Lord Merriman P. that this order should be set aside.

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Appeal allowed; order set aside.

Solicitors: *Gregory, Rowcliffe & Co. for Harrison & Sons, Welshpool; John Lewis & Woods for Norman Morgan & Davis, Cardiff.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* JACK BRADLEY (ACCRINGTON) LTD. SAME *v.* BRADLEY.

1958 *Oct.* 29.

Lord Parker C.J.

[1957 C. No. 3427.]

[1957 C. No. 3428.]

Revenue — Customs and excise — Forfeiture — Vehicle "used for the "carriage of" goods liable to forfeiture—Oil in fuel tank of vehicle liable to forfeiture—Whether vehicle also so liable—Meaning of "carriage"—Customs and Excise Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 44), *ss.* 199 (1), 200 (2) (3), 277 (1).

Kerosene which had been delivered to the defendants for home use and on which a rebate of duty had been allowed under section 199 of the Customs and Excise Act, 1952,[1] was found in the fuel tanks of a number of the defendants' motor-vehicles. No amount equal to the rebate on the oil had been paid by the defendants to the commissioners and, accordingly, the oil used in the tanks was

[1] Customs and Excise Act, 1952, s. 199: "(1) Subject to the next "following section, where any heavy "oils charged with the customs duty "on hydrocarbon oils are delivered for "home use there shall be allowed "thereon a rebate of duty . . ."

S. 200: "(1) If, on the delivery "of any heavy oils for home use, it is "intended to use the oils as fuel for "a vehicle to which this section "applies, a declaration shall be made "to that effect in the entry for home "use and thereupon no rebate shall "be allowed in respect of those oils. "(2) No heavy oils on the delivery of "which for home use rebate has been "allowed shall be used as fuel for a "vehicle to which this section applies "unless there has been paid to the "commissioners, in accordance with "regulations made for the purposes "of this subsection, an amount equal "to the rebate on like oils at the "rate for the time being in force. "(3) If any person uses any heavy "oils contrary to the last foregoing "subsection . . . he shall be liable "to a penalty of three times the "value of the oils or £100, which-"ever is the greater, and the oils "shall be liable to forfeiture."

S. 277: "(1) Without prejudice "to any other provision of this "Act, where any thing has become "liable to forfeiture under the "customs or excise Acts—(*a*) any "ship, aircraft, vehicle, animal, "container . . . or other thing what-"soever which has been used for the "carriage, handling, deposit or con-"cealment of the thing so liable to "forfeiture, either at a time when it "was so liable or for the purposes of "the commission of the offence for "which it later became so liable; and "(*b*) any other thing . . . found with "the thing so liable, shall also be "liable to forfeiture."

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liable to forfeiture, under section 200 (3) of the Act. On the question whether the vehicles themselves became liable to forfeiture under section 277 (1):—

Held, that the vehicles had "been used for the carriage of" the oil within section 277 (1) (*a*) for the purposes of the commission of the offence, namely, consumption of the oil in the vehicles, for which the oil later became liable to forfeiture; accordingly, the vehicles were also liable to forfeiture.

ACTION.

On January 23, 1957, seven diesel vehicles, the property of the defendants, Jack Bradley (Accrington) Ltd., and one of which the defendant, Jack Bradley, was the owner, were at Preston Docks, Accrington. The fuel tanks of the vehicles were filled with kerosene mixed with Derv. The kerosene was a heavy oil within section 195 of the Customs and Excise Act, 1952, and had been part of a bulk delivery of some 61,500 gallons of kerosene delivered for home use to the defendants. On the delivery, such allowance of rebate of duty was made as was provided for by section 199 of the Act. No payment equal to the rebate on the kerosene used in the vehicles in accordance with section 200 (2) of the Act had been made, and that kerosene was liable to forfeiture under section 200 (3). On July 3, 1957, the defendants were fined £350 each. The Commissioners of Customs and Excise contended that the vehicles were used for the carriage or deposit of the kerosene either at the time when it was liable to forfeiture or for the purposes of the commission of the offence of using it as fuel for a vehicle for which it later became so liable, and therefore the vehicles themselves became liable to forfeiture by virtue of the provisions of section 277 (1) of the Act, and the commissioners claimed condemnation of the vehicles. The two cases were heard together.

Rodger Winn for the commissioners.

J. M. E. Di Nahum Q.C. and *Harry Hague* for the defendants.

The following cases were referred to in argument: *De Keyser* v. *British Railway Traffic and Electric Co.*[2]; *Tuck & Sons* v. *Priester.*[3]

LORD PARKER C.J. This is a claim by the Commissioners of Customs and Excise for the condemnation of certain vehicles, the property of the defendants, which they seized as forfeited. The case concerns the use by the defendants, who are garage proprietors and have a fleet of lorries, of kerosene which can be used mixed with fuel oil in tanks for the fuel of the lorries.

The position under the legislation is that kerosene is used largely for domestic and agricultural purposes and for stationary

[2] [1936] 1 K.B. 224; 52 T.L.R. 73.

[3] (1887) 19 Q.B.D. 629.

engines such as cranes, excavators and heating plant, and, so long as it is used for those purposes, the legislature has seen fit to say that no duty is payable. On the other hand, when it is used in connexion with moving engines duty is payable, and because the latter use is comparatively small it is provided that kerosene which is delivered for home use is allowed a full rebate of duty and, so long as it is used for the permitted purposes no duty becomes payable. But if it is used for moving vehicles as fuel in tanks, then it becomes subject to duty. [His Lordship read section 200 of the Customs and Excise Act, 1952, and continued:] So far as the facts of this case are concerned, all that need be stated is that some of the defendants' lorries were found working at the docks with tanks containing kerosene mixed with diesel oil and that was not kerosene in respect of which the defendants had made any declaration or in respect of which they had paid duty as provided by section 200 (2), and, accordingly, by subsection (3) the oil became liable to forfeiture and the defendants became liable to a penalty. They were prosecuted and fined, but I am concerned solely with the question of forfeiture.

The oil being subject to forfeiture, the question arises whether the commissioners are, in addition, entitled to forfeit, as they claim to do, the vehicles themselves, and that depends on the true construction of section 277 of the Customs and Excise Act, 1952. So far as material it reads as follows: "(1) Without prejudice "to any other provision of this Act, where any thing has become "liable to forfeiture under the customs or excise Acts—(*a*) any ". . . vehicle . . . container . . . or other thing whatsoever which "has been used for the carriage . . of the thing so liable to for-"feiture, either at a time when it was so liable or for the purposes "of the commission of the offence for which it later became so "liable; and (*b*) any other thing . . . found with the thing so "liable, shall also be liable to forfeiture." It is clear, and, indeed, admitted, that there was a contravention of section 200 (3), and that the oil in the fuel tanks became liable to forfeiture. The question then becomes whether, under section 277, the vehicles had been used for the carriage of that oil, either at a time when it was liable to forfeiture, or for the purposes of the commission of the offence for which it later became liable, to forfeiture. It is not an easy point and one must bear in mind that powers such as these, if they are to be taken and exercised by the commissioners, must be in clear language.

It has been argued forcibly by Mr. Nahum that "carriage," in the ordinary way, means carriage of the thing or the goods as a cargo, from one point to another for use there or for distribution, and that it is quite inapt to cover the incidental carriage of fuel for the purposes of being consumed on the journey. He points to the ordinary use of the word "carriage"; refers to the previous legislation, the Customs Consolidation Acts of 1853 and 1876; points out that the Act of 1952 is a consolidating

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statute, and says that there is no reason to treat " carriage " other than as conveyance of the goods as a cargo for the purposes of distribution. " Carriage," of course, is a very wide word, which can be used to cover an incidental carriage of goods as well as a whole cargo of goods. It need not convey the notion of something loaded on a vehicle, but can include anything so long as it is carried on the vehicle.

I think the crux of this case is the construction of the words " which has been used for " that carriage. Clearly, if that meant a vehicle which had been used for the object or with the intention or purpose of carrying something from " A " to " B," then the purposes for which these vehicles were being used being purposes in connexion with the docks, it was only incidentally that they were carrying oil at the time. The purpose of carrying oil being for consumption and not for taking it from one place to another. But I do not think that the words are used in that sense. It seems to me that they are used—and one would expect them to be used in a statute of this sort—as meaning " where use has been made " of the vehicle to carry," or " where a vehicle has been made " use of in the carriage of." Indeed, some support for that view is to be obtained from considering section 278, which is dealing with forfeiture of large vessels, and there forfeiture cannot take place unless the offence in connexion with which the forfeiture is claimed was substantially the object of the voyage during which the offence was committed.

Looked at in that way it seems to me that, as a matter of English, what happened here comes directly within the words " which has been used for " in section 277 (1) (*a*), because it can be said that use was made of these vehicles for carrying the oil for the purposes of the commission of the offence for which the oil later became liable to forfeiture. The offence is the use of oil. I am not deciding whether it may not be right to say that use is made of oil when it is appropriated to a particular purpose, the unauthorized purpose. One thing, at least, is clear, that oil is used when it is consumed, and, that being so, I cannot see why, as an ordinary matter of language, use was not being made of the vehicles to carry oil for the purposes of that oil being consumed, which itself was the offence for which the oil later became liable to forfeiture. Looked at in that way it seems to me that the plain words of the section cover this case.

I should add that section 277 is a general section covering, and intended to cover, the case of vehicles, ships, containers and other matters used in connexion with a number of other offences which have been set out in the statute, and I should have thought that the second limb of section 277 (1) (*a*), contemplates that one may properly have uncustomed goods in this country, but that if some particular use is made of them they become subject to duty, and the words " for the purposes of the commission of " the offence for which it later became liable " are clearly covering just the present sort of case, where the ordinary use of oil is one

which does not attract duty, but if it is used for a particular purpose then duty is payable and, if not paid, an offence is committed.

I think that the oil in these tanks was being carried for the purposes of the commission of the offence, namely, consumption, for which it later became liable to forfeiture. Accordingly, in my view, the seizure was correct and the commissioners are entitled to the condemnation sought.

Order accordingly.

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COMMISSIONERS OF CUSTOMS AND EXCISE *v.* JACK BRADLEY (ACCRINGTON) LTD.

Solicitors: *Solicitor, Commissioners of Customs and Excise; Sharpe, Pritchard & Co., for Richard Pate & Co., Accrington.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

TONKIN *v.* RAVEN.

1958
Oct. 22.

Lord Parker C.J., Streatfeild and Diplock JJ.

Shop — Sunday closing — Exemption from — Retail shop carrying on several trades or businesses—Failure to display notice stating purpose for which shop open—Prosecution—Charge improperly laid—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *ss.* 47, 50.

The shopkeeper of a general store was charged with an offence under section 50 of the Shops Act, 1950,[1] and the Shops Regulations, 1937[2] (which now apply to the Act of 1950) by failing to display a notice stating the purpose for which the shop was open on Sunday. The justices took the view that the charge as laid showed no offence, and that the shopkeeper should have been charged under section 47 (which provides for the closing of every shop on Sunday except as otherwise provided). They accordingly dismissed the charge. On appeal by the prosecutor:—

Held, that section 50 could not, of itself, create an offence because it was a purely permissive section providing exemption in certain circumstances from the prohibition contained in section 47;

[1] Shops Act, 1950, s. 47: "Every "shop shall, save as otherwise pro- "vided . . . be closed for the serving "of customers on Sunday: . . ."

S. 50: "Where several trades or "businesses are carried on in the "same shop and any of those trades "or businesses consist only of trans- "actions of such a nature that, if "they were the only transactions "carried on in the shop, the pro- "visions of this Part of this Act "requiring the shop to be closed for "the serving of customers . . . [on] ". . . Sunday would not apply to the "shop, the shop may be kept open "for the whole or any part of Sun- "day, . . . for the purposes of those "transactions alone, subject, how- "ever, to such conditions as may be "prescribed."

S. 76 repealed, inter alia, the Shops (Sunday Trading Restriction) Act, 1936, and applied the Shops Regulations, 1937, to the Shops Act, 1950.

[2] Shops Regulations, 1937 (S.R. & O. 1937, No. 271), reg. (1): "The "conditions subject to which a shop ". . . to which section 4 of the Shops "(Sunday Trading Restriction) Act, "1936, . . . applies, may be kept "open in accordance with the provi- "sions of that section for the whole "or any part of Sunday, shall be as "follows—(*a*) during any time on "Sunday when the shop is open for "the serving of customers there shall "be exhibited . . . notices [stating "the purposes for which the shop is "open on Sunday]."

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that section 47 was the governing section creating the offence, and therefore the justices had come to a correct decision in law and the appeal should be dismissed.

CASE STATED by East Ham justices.

On March 25, 1958, an information was preferred by Douglas George Tonkin, chief Shops Act inspector for the County Borough of East Ham, against the defendant, Bertie Raven, alleging that on Sunday, January 19, 1958, he, the occupier of a shop or place at which the retail trade or business of general stores was carried on, situated at Church Road, E.12, within the district of the council, "failed to comply with the provisions contained in "section 50 of the Shops Act, 1950, and regulations made there-"under in that notices as required by the section and regulations "were not displayed stating the purpose for which the shop was "open, contrary to the said provisions of the Act." The defendant did not appear.

At the beginning of the proceedings the court had intimated to the prosecutor that, in their view, there appeared to be no offence known to the law disclosed in the summons and, accordingly, they adjourned the hearing sine die to give the prosecutor an opportunity to seek instructions in the matter. On the application of the prosecutor the matter was restored to the list for hearing a fortnight later. The defendant did not appear at the adjourned hearing.

It was contended by the prosecutor that section 50 of the Act created an offence; if a shopkeeper kept his shop open on a Sunday, and that shop carried on several trades, if a notice in the prescribed form was not exhibited, the shopkeeper was liable to be proceeded against for failing to display that notice under section 50 of the Act; and that the penalty for such an offence was to be found in section 59.

The justices were of opinion that if an offence was to be alleged it should be taken under section 47 of the Act, which prohibited the opening of a shop on Sundays with certain exceptions; if several trades were carried on in a shop and the occupier desired to remain open on a Sunday for the sale of any of the articles referred to in the Fifth Schedule he could do so only if a notice in the prescribed form were exhibited; section 50 of the Act was created in order to allow occupiers of shops carrying on a mixed trade and opening on a Sunday to do so, and was therefore an exempting section from prosecutions under section 47 provided such a notice was exhibited; if such a notice was not exhibited then an offence was committed under section 47 of the Act. They accordingly dismissed the information. The prosecutor appealed.

Paul Wrightson for the prosecutor.

The defendant did not appear and was not represented.

The following case was cited in argument: *Waterman* v. *Wallasey Corporation*.[3]

LORD PARKER C.J. This is a case stated by justices for the County Borough of East Ham, before whom the defendant was charged with an offence against the Shops Act, 1950. The charge was in this form, that he being "the occupier of a shop or place "at which the retail trade or business of general stores was "carried on, situated at 301, Church Road, E.12, within the "district of the council, did fail to comply with the provisions "contained in section 50 of the Shops Act, 1950, and regulations "made thereunder in that notices as required by section 50 of "the Shops Act, 1950, and regulations made thereunder were "not displayed stating the purpose for which the shop was open, "contrary to the said provisions of the said Act."

This is a case where one has the greatest sympathy with the justices. The defendant did not appear. There was no argument on his side, and they were faced with advice from their clerk that the charge disclosed no offence in law. The justices came to the conclusion that there was something in that advice and adjourned the hearing in order that the prosecutor might consider the matter. The matter was argued later and, in the end, the justices decided that the charge was wrongly laid and dismissed it. This is a highly technical point, but it may none the less be a good one. It depends on the true construction of certain sections of the Shops Act, 1950.

[His Lordship read sections 47 and 50 of the Act, and continued:] For certain transactions a shop is entitled to remain open on Sunday. The type of transaction is set out in the Fifth Schedule. In the case of multiple businesses, if the trade consists only of transactions which come within the Fifth Schedule, the shop may be kept open for those transactions alone, subject to certain conditions. These conditions were prescribed under the Shops (Sunday Trading Restriction) Act, 1936, and are to be found in the Shops Regulations, 1937. By section 76 of the Act of 1950 those regulations were continued and are the relevant regulations in the present case. They provide that as a condition of remaining open under section 50—originally it was section 4 of the Act of 1936—two conditions shall be fulfilled: (1) certain notices shall be exhibited, and (2) no goods shall be exhibited other than goods for the sale of which the shop can lawfully be kept open.

Finally, section 59 provides that "In the case of any contra-"vention of any of the foregoing provisions of this Part of this "Act, the occupier of the shop shall be liable to a fine . . ."— and a scale of fines is set out.

The short point in this case is whether the charge was properly laid as an offence against section 50 of the Act of 1950 and the regulations. The view which the justices took was that it should

[3] [1954] 1 W.L.R. 771; [1954] 2 All E.R. 187.

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have been laid under section 47. The arguments are fairly evenly divided. Mr. Wrightson has referred to the Shops Act, 1912, where the equivalent to section 50 of the Act of 1950 was made an express proviso to section 4 (1). Section 4 of the Act of 1912 corresponded with the present section 47, and, by subsection (7), laid down the offence. In other words, under the original scheme of legislation one found in section 4 of the Act of 1912 a self-contained code of general prohibitions, the exemptions to them, and the penal provision. Mr. Wrightson argues that the present scheme is a different one. True, there may be offences against section 47 but, he argues, there may also be offences against the subsequent sections, particularly section 50. The contravention of those subsequent sections (including section 50) are themselves separate offences; and he relies in particular on the wording of section 59, namely, "In the case of any contravention of any of "the foregoing provisions of this Part of this Act . . . "

Paying due regard to that, I find it impossible to say that section 50 creates any offence at all. It is clear that it is merely a permissive section subject to certain conditions, and I cannot see how a permissive section can, of itself, create an offence. There must be some preceding section which does create the offence to which the permissive section is an exemption, and, despite the present lay-out of the Act of 1950, I am constrained to feel that the position is exactly the same as it would have been under the Act of 1912. Mr. Wrightson concedes that under that Act a charge would have to be preferred of an offence contrary to section 4, which is now section 47. I think that the justices properly applied their minds to this question and came to a correct decision in law, and I would dismiss this appeal.

STREATFEILD J. I agree. In my view the starting-point for the construction of this Act is the wording of section 47: "Every "shop shall, save as otherwise provided by this Part of this Act, "be closed for the serving of customers on Sunday:" that is to say, there is a complete embargo on the opening of any shop on Sundays unless it is otherwise provided. There is a proviso to section 47 where it is otherwise provided immediately, namely, shops which come within the Fifth Schedule are exempt from the provision of the section. One then passes to section 50 which, as my Lord has pointed out, is a purely permissive section, and upon the question of construction it is difficult to see how a permissive section can, in itself, create an offence. To my mind, section 50 means no more than this, that where several trades or businesses are carried on in the same shop, and any one of those trades consists only of transactions to which this Part of the Act would not apply, then the shop may obtain exemption provided it complies with the regulations. That simply creates another exception to section 47 which is the governing section creating the offence. It is quite true that the lay-out of the Act of 1950 is different from the Act of 1912, inasmuch as there is no penalty

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clause in section 47. That is reserved for section 59 which lays down certain penalties "in the case of any contravention of any "of the foregoing provisions of this Part of this Act." Mr. Wrightson pointed out that there are no other sections to which that section could apply unless section 50 creates an offence as well as section 47. Without the matter having been fully argued I should be inclined to the view that section 53, which deals with occupiers of shops professing the Jewish faith, might in itself create a separate offence. Section 55 would clearly create a different offence, that of delivering goods to customers on occasions when the shop would not otherwise be open; and section 57, which deals with notices, might create a separate offence. Those are other instances of offences which are separate from section 47, and which are all collected together so far as penalty is concerned under section 59 of the Act.

I have come to the conclusion that the real offence, if any, which was committed here was that of remaining open on Sunday contrary to section 47 because, by reason of his failure to display the required notices, in other words, to observe the conditions laid down in the regulations, the defendant has not brought himself within the exception visualized by section 50. In my judgment, the justices were quite right in saying that the offence committed here, if any, was under section 47 rather than under section 50, and for those reasons I think this appeal should fail.

DIPLOCK J. For the reasons given by my Lords I agree.

Appeal dismissed.

Solicitor: *Sharpe, Pritchard & Co. for R. H. Buckley, Town Clerk, East Ham.*

E. M. W.

[HOUSE OF LORDS.]

REGIS PROPERTY CO. LTD. . . . APPELLANT;

AND

DUDLEY . . . . . RESPONDENT.

H. L. (E.)*

1958

July 28, 29, 30; *Oct.* 21; *Nov.* 6.

Landlord and Tenant — Rent restriction — Rent limit — Appropriate factor—Tenant's liability for repairs under terms of tenancy—Concurrent liability at common law—"Fair wear and tear"—Services—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *ss.* 1, 2, *Sch. I, para.* 1 (1) (2) *and* (3).

Landlord and Tenant—Repairs—Covenant—"Fair wear and tear"—Meaning.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD DENNING.

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By section 1 (1) of the Rent Act, 1957, "the rent recoverable "for any rental period from the tenant under a controlled "tenancy shall not exceed . . . a rent of which the annual rate "is equal to the 1956 gross value of the dwelling multiplied by "two (or, if the responsibility for repairs is such as is specified "in Part I of the First Schedule to this Act, by the appropriate "factor specified in the said Part I). . . ."

By Part I of Schedule I: "1—(1) The following provisions "shall have effect in ascertaining the rent limit by reference to the "1956 gross value. (2) If under the terms of the tenancy the "tenant is responsible for all repairs, the appropriate factor shall "be four-thirds. (3) If under the terms of the tenancy the tenant "is responsible for some, but not all, repairs, the appropriate "factor shall be such number less than two but greater than "four-thirds as may be . . . determined by the county court."

The landlords of a block of flats in London applied to the county court to determine the increase of rent permissible under the Act in respect of one of the flats let unfurnished at an inclusive rent of £139 16s. 9d. a year, which, owing to an increase of rates, had been increased to £145 12s. 5d. The tenant's obligations to repair under the lease were to keep the interior of the flat in good and substantial repair and clean sanitary condition, fair wear and tear and damage by accidental fire excepted. The judge fixed the appropriate factor at $1\frac{2}{3}$, holding that the liability of the landlords and of the tenant for repairs was about equal:—

Held (Lord Keith of Avonholm and Lord Denning dissenting) that the judge had not erred in principle in fixing the appropriate factor. Even though some items of repair might be made necessary by the act of the tenant for which he could be made liable at common law, yet, if he was also liable for it under the terms of the tenancy, he was to be regarded as responsible for it for the purpose of determining the appropriate factor, since the court was concerned only with his responsibility expressed by the terms of the tenancy. For the purpose of the determination a hypothetical tenant was to be assumed who was reasonably careful in his user of the premises, but that did not import a tenant who was never guilty of any act of negligence.

Held, further, unanimously, that the judge did not err in crediting the tenant with more than a nominal amount in respect of his liability to repair, in view of the "fair wear and tear" exception. The exemption covered no more than the remedying of things which wear out in the course of reasonable use; it did not cover other damage which flowed from the wear and tear.

Dictum of Talbot J. in *Haskell* v. *Marlow* [1928] 2 K.B. 45, 58; 44 T.L.R. 171 approved.

Taylor v. *Webb* [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590 doubted.

Decision of the Court of Appeal [1958] 1 Q.B. 346; [1958] 2 W.L.R. 356; [1958] 1 All E.R. 510 affirmed.

APPEAL from the Court of Appeal (Jenkins, Sellers and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal dated February 7, 1958, dismissing the appeal of the appellants, Regis Property Co. Ltd., from the order of Judge Hargreaves dated August 29, 1957, whereby it was ordered and declared that the appropriate factor, by which the gross value of certain premises known as Flat 248, Shelsea Cloisters, S.W.3, in the County

of London, of which the appellants were landlords and the respondent, Thomas Henry Dudley, was the tenant, was to be multiplied for the purpose of ascertaining the rent limit applicable thereto, was five-thirds.

The facts are stated in the opinions of Viscount Simonds and Lord Morton of Henryton.

Neil Lawson Q.C. and *Brian Galpin* for the appellant company.
R. E. Megarry Q.C. and *G. Avgherinos* for the respondent.

The following cases, besides those referred to in their lordships' opinions, were cited in argument: *Harris* v. *Jones* [1]; *Mantz* v. *Goring* [2]; *Davies* v. *Davies* [3]; *Terrell* v. *Murray* [4]; *Lister* v. *Lane & Nisham* [5]; *Citron* v. *Cohen* [6]; *Scales* v. *Lawrence* [7]; *A. C. Billings & Sons Ltd.* v. *Riden* [8]; *Stepney Borough Council* v. *Joffe*.[9]

Their lordships took time for consideration.

November 6. VISCOUNT SIMONDS. My Lords, the respondent is the tenant of certain premises known as Flat 248, Chelsea Cloisters in the county of London. His landlords are the appellant company Regis Property Co. Ltd. These premises are, by reason of their low net rateable value, subject to rent control under the provisions of the Rent Act, 1957. That Act, however, provides that a landlord may, upon giving the appropriate notice, alter the method of calculating the rent of controlled dwelling-houses from the former basis of a standard rent plus permitted increases to a new basis which, so far as is relevant to the present appeal, is to be fixed by multiplying the gross rateable value of the premises by what is called "the "appropriate factor."

Taking advantage of this provision, on July 22, 1957, the appellant company applied to the West London County Court for an order determining the appropriate factor by which the gross value of the premises should be multiplied for the purpose of ascertaining the rent limit applicable thereto, and served due notice of the application on the respondent. Other matters also were brought before the court, but with these your Lordships are not concerned.

On August 29, 1957, the learned county court judge made an order determining that the appropriate factor for the relevant purpose was five-thirds. An appeal from his order was dismissed by the Court of Appeal. Your Lordships are now asked to set these orders aside and to remit the application to the county

[1] (1832) 1 Moo. & R. 173.
[2] (1838) 4 Bing.N.S. 451.
[3] (1888) 38 Ch.D. 499.
[4] (1901) 17 T.L.R. 570.
[5] [1893] 2 Q.B. 212; 9 T.L.R. 503.
[6] (1920) 36 T.L.R. 560.
[7] (1860) 2 F. & F. 289.
[8] [1958] A.C. 240; [1957] 3 W.L.R. 496; [1957] 3 All E.R. 1.
[9] [1949] 1 K.B. 599; 65 T.L.R. 176; [1949] 1 All E.R. 256.

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court for the redetermination of the appropriate factor in accordance with what appear to your Lordships to be the correct principles upon which it should be determined. I emphasise that your Lordships can take this step only if the learned judge and the Court of Appeal acted upon some wrong principle.

It is convenient that I should now state in greater detail first the relevant provisions of the 1957 Act and then the tenancy agreement between the parties.

Section 1 (1) of the Act provides that: "Subject to the "following provisions of this Act the rent recoverable for any "rental period from the tenant under a controlled tenancy shall "not exceed . . . a rent of which the annual rate is equal to the "1956 gross value of the dwelling multiplied by two (or, if the "responsibility for repairs is such as is specified in Part I of the "First Schedule to this Act, by the appropriate factor specified in "the said Part I)," together with annual amounts in respect of rates and service with which this appeal is not concerned. As I have already indicated, "appropriate factor" means the number by which the gross value is to be multiplied in determining the rent limit.

The relevant provisions of Part I of Schedule I may be set out verbatim. They are as follows: "1.—(1) The following "provisions shall have effect in ascertaining the rent limit by "reference to the 1956 gross value. (2) If under the terms "of the tenancy the tenant is responsible for all repairs, the "appropriate factor shall be four-thirds. (3) If under the terms "of the tenancy the tenant is responsible for some, but not all, "repairs, the appropriate factor shall be such number less than "two but greater than four-thirds as may be agreed in writing "between the landlord and the tenant or determined by the "county court."

It is plain that it is only Part I of the Schedule which has any bearing upon the determination of the appropriate factor, but the appellants referred to and relied upon Part II and I therefore myself refer to it. It is concerned with the obtaining of a so-called certificate of disrepair which, while it is in force, prevents the landlords from getting the increase of rent which they might otherwise get under Part I. It is headed "Abatement for disrepair" and contains elaborate provisions for the service by a tenant of a notice of disrepair of the premises by reason of defects stated in the notice, for the landlords' undertaking to repair the defects, for the issue by the local authority to the tenant of a "certificate of disrepair," and for the cancellation in certain circumstances of such certificate, and so on. Specifically it provides, by paragraph 7 (2), that: "Where a "certificate of disrepair is issued, then as respects any rental "period beginning while the certificate is in force the appro-"priate factor shall be four-thirds." Reliance was also placed on paragraph 15, which provides that references in that Part (i.e. Part II) of the Schedule "to defects for which the tenant

" is responsible are references to defects for the remedying of " which, as between the landlord and the tenant, the tenant is " responsible, or defects which are due to any act, neglect or " default of the tenant or any person claiming under him or " any breach by the tenant or such a person of any express " agreement." These provisions may give rise to difficulties of their own, but I am at a loss to know what light they can throw upon the meaning of the provisions of Part I.

The tenant's obligations in respect of repair are contained in clause 2 (C), (D), (E) and (F) of the agreement and are as follows:—

" (C) To keep the interior of the flat together with all the " fixtures and fittings now or hereafter therein (including the " doors windows sanitary and water apparatus thereof) in good " and substantial repair and clean sanitary condition (fair wear " and tear and damage by accidental fire excepted), and so to " deliver up at the end or sooner determination of the tenancy:

" (D) To forthwith comply with any notice that may be " given by the landlord requiring any breach of any of the " obligations on the part of the tenant under the last preceding " clause to be made good Provided that if the tenant shall " make default for a period of one month in complying with " such notice it shall be lawful for the landlord (but without " prejudice to the right of re-entry hereinafter contained) to " enter upon the flat and execute the repairs at the expense of " the tenant in accordance with the provisions hereof and the " expenses of such repairs shall be repaid by the tenant to the " landlord on demand:

" (E) To observe and perform the rules and regulations " specified in the Schedule hereto or any reasonable modifica- " tions thereof or additions thereto made from time to time by " the landlord for the proper conduct of the building and of " which notice shall be given to the tenant in writing or left " for the tenant at the flat. The tenant shall accept as final " and binding the landlord's decision upon any matter arising " out of the said rules and regulations or any such modifications " thereof or additions thereto:

" (F) Not without the previous consent in writing of the " landlord to alter or interfere with the construction or arrange- " ment of the flat or the fixtures or fittings therein belonging to " the landlord or for which the landlord is responsible or alter or " injure any of the walls floors ceilings wiring pipes or drains " of the flat or alter the colour of any painted woodwork and if " the tenant shall carry out any redecoration or other work he " shall properly prepare all woodwork before painting and strip " or properly prepare all walls and ceilings before papering or " distempering: "

The only relevant rule in the " Schedule of Rules and Regu- " lations " is rule 1, which is in these terms: " Tenants shall " keep all baths sinks cisterns and waste and other internal pipes

"in or connected with their flats clean and open and in proper "repair and order and shall be responsible for all damage "occasioned to their own or other flats through any breach of "this rule or through the improper use or negligence of themselves or their servants or through the stopping up or bursting "of the said baths sinks cisterns or pipes due to the negligence "of the tenants or their servants and shall carry out during the "tenancy any works required to the internal water pipes fittings "apparatus etc., to comply with any notices served by the "Metropolitan Water Board or the local sanitary authority." This provision is clearly out of place. It is an important obligation of repair and I should have expected it to follow clause 2 (C) in the body of the agreement. It will be seen that some difficulty has been caused by this fact.

The only other fact which need be noticed is that the appellants' agents circularised the tenants to the effect that where taps required washering or reseating they were particularly requested to report it to the porter's lodge when the landlords would be pleased to effect repairs without charge to the tenant. I do not think that this offer, which could at any moment be recalled, can affect the appropriate factor.

When the application came before the county court judge evidence was given by an expert witness on each side and it was natural that their opinions should widely differ as to the burden in terms of pounds, shillings and pence falling upon the tenant under the terms of the agreement. It was a noteworthy fact that the landlords' witness was for reducing the tenant's liability, the tenant's for enlarging it. The learned judge did not wholly accept the evidence of either of them and held that the landlords' liability for repairs should be valued at £7 5s. per annum and the tenant's at £7 7s. He therefore assessed the appropriate factor at five-thirds. I do not think that in coming to this conclusion the learned judge preferred the principles adopted by one witness to those adopted by the other: I doubt whether there was in this respect any difference between them. The difference was in quantum—a matter of fact upon which the decision cannot be questioned unless the judge erred in principle.

I ask, then, what was the error in principle? It appears that in the county court and in the Court of Appeal two main questions and a subsidiary question were argued. The first main question is succinctly stated in the first and second reasons in the appellants' formal case. They are (1) that "the learned "county court judge erred in principle in having regard to repairs "for which the respondent would be responsible at common law "had there been no repairing covenant in his tenancy agreement" and (2) (which is consequential) that he "erred in "principle in evaluating those liabilities, in that he credited the "respondent with the full value thereof."

As I understand the argument for the appellants, it is that,

if some repair is necessary to the premises and if that repair is made necessary by some act of the tenant for which he could be held liable at common law, then, notwithstanding that he is also liable to repair under the terms of his tenancy, it is a repair for which he is not to be regarded as responsible for the purpose of determining the appropriate factor under Part I of the Schedule to the Act. This argument was rejected, and, in my opinion, rightly rejected, in the county court and the Court of Appeal. The court is concerned only with the tenant's responsibility for repairs under the terms of the tenancy. It is irrelevant why those repairs have become necessary. I am ignoring for the moment the "fair wear and tear" clause which demands separate consideration. Nothing could be plainer than the language of Part I: "If under the terms of the tenancy the "tenant is responsible for *all* repairs": "If under the terms "of the tenancy the tenant is responsible for some, but not all, "repairs." I see no reason why "all" should mean anything less than all, why there should be excluded from "all" repairs those repairs (if there be any) which the tenant can be called upon to execute by invoking the doctrine of permissive waste or any implied obligation on his part arising at common law out of the relation of landlord and tenant or even, as was suggested, by reason of his negligence. Not only is there no possible reason for any such interpolation: it would as a practical matter be a difficult, if not an impossible, task to fix the tenant with any such liability. I do not recall any case, I do not, my Lords, believe that there is any case in the books, in which a court of law has been asked to do gross violence to the plain language of a statute upon such an inadequate pretext. The language is plain: no words could more plainly express a simple concept. The violence is gross: an indefinite "some" is substituted for "all." The pretext is inadequate and worse. For it is in itself nothing else than the assertion that in this difficult area of the relation of landlord and tenant the court knows better than Parliament what changes should be made in the existing legislation and will adjust and alter the language of a statute accordingly. I reject with such emphasis as I can command any such suggestion. I am content to adopt the view expressed by Pearce L.J., delivering the unanimous judgment of the Court of Appeal,[1] that "such repairs are in fact a responsibility under "the express terms of the agreement. The fact that there may "be a concurrent liability at common law does not alter that "fact." He added, and I agree, that "if one applies the test "of common-sense and practice, one can hardly imagine a "landlord claiming against a tenant in respect of them other "than under the express covenant." This challenge to the judgment of the county court judge, which primarily, if not

[1] [1958] 1 Q.B. 346, 358–359; [1958] 2 W.L.R. 356; [1958] 1 All E.R. 510.

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solely, turns on the true construction of the statute, therefore fails.

It is convenient at this stage to notice an argument which was directed to the alleged anomalous result of the decision. It was said to put a premium on a tenant's negligent conduct enabling him to proclaim how bad a tenant he was and would be, what damage he would do and how heavy would be his liability to repair and therefore to demand that the appropriate factor should be as low as possible. My Lords, I do not doubt that such complicated legislation as the Rent Act has led and will lead to some anomalies. But I am not moved by this suggested anomaly. The court is not concerned with the character or proclivities of the particular tenant. Rightly, no evidence was given in regard to those of the present respondent. The court is concerned only with the premises and the relevant repairing obligations of the tenant.

At this stage I must diverge from the argument as presented to the Court of Appeal and in the formal case of the appellants in this House. The assumption being made that upon the true construction of the Act the county court judge did not err in principle in having regard to repairs for which the respondent might be responsible at common law had there been no repairing covenant in his tenancy agreement, it appeared to their Lordships that the question was still unresolved what weight should be given to this element in a tenant's obligations in determining the appropriate factor. They, therefore, required further argument from counsel and posed to them the question whether upon the assumption already stated the learned judge had misdirected himself by not assuming, for the purpose of his determination, a tenant who was reasonably careful in his user of the premises let to him. It appeared, however, at once that there was some ambiguity in this question. Learned counsel for the appellants, Mr. Lawson, adhering to the view that damage due to negligence (as I will call it for short) must be altogether excluded, was, of course, ready to accept the standard of a hypothetical tenant who was reasonably careful if that meant a tenant who, being reasonably careful, never caused damage by carelessness. A number of difficult questions would admittedly arise in respect of damage caused by the tenant's family or guests or licensees or trespassers. But, broadly speaking, the result was precisely the same as it would be if no assumption had been made and damage due to negligence and a consequent obligation to repair were outside the relevant computation. And to reinforce this view he made it quite clear that he did not ask your Lordships to remit the case to the county court for further consideration except upon that basis.

The attitude of learned counsel for the respondent, Mr. Megarry, was very different. He agreed, he could not do otherwise, that it is necessary to assume some kind of tenant since the rent is to be paid by a tenant. What sort of tenant,

then, is this hypothetical tenant to be? For Mr. Megarry, as for Mr. Lawson, the essential question was whether damages for negligence should be excluded, and it appeared to me that, as long as this question was answered in the negative, he did not mind whether the hypothetical tenant was described as an average tenant or a reasonably careful tenant or by any other description. He was in fact satisfied with the way in which the matter had been dealt with by the county court judge, who declined to assume a tenant who in his own words "can be "relied on always to be careful."

Upon this question there was much discussion. It was clearly a very difficult matter to define the hypothetical tenant with any sort of precision. It is desirable that more definition should not be attempted than the occasion needs and therefore, though I had myself attempted that task, I shall say no more than that having read the opinion, which my noble and learned friend, Lord Tucker, will shortly deliver, I find myself fully in agreement with every word of it and respectfully adopt it.

I turn to the second main question argued in the courts below and again I look at the appellants' third and fourth reasons in their formal case. They are (1) that the county court judge "erred in principle in crediting the respondent with more than a "nominal amount in respect of his liability to repair in view of "the 'fair wear and tear exception' contained in the tenancy "agreement," and (2) that "*Taylor* v. *Webb* [2] was rightly "decided." This latter reason must remain, for the moment, enigmatical. I will return to it.

The purport of his argument is that the qualification of the repairing covenant in clause 2 (C) by the fair wear and tear clause reduces the value of the tenant's obligation to a small or even negligible amount, that this is the effect of the decision in *Taylor* v. *Webb* [2] and that the learned judge did not pay sufficient regard to it. I must interpose that counsel for the respondent, the tenant, while content with the order as it stands, asks that if the matter is remitted to the county court, there should be a direction to the judge to assess the appropriate factor upon the footing that *Taylor* v. *Webb* [2] was wrongly, not rightly, decided. He claimed that too much weight had been given to that decision and that upon a true view of the clause the tenant's obligation under the covenant, though qualified, was greater than the judge allowed. It is, I think, a fair criticism of the judgment of the learned judge that it is not easy to see just how, as a matter of principle, he did regard the impact of the fair wear and tear clause nor how he translated into figures the qualification which it imposed on the covenant.

My Lords, I must now refer to *Taylor* v. *Webb*,[2] which has loomed large in this case, though I doubt whether it has great practical importance. There is, I think, no doubt that the

[2] [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590.

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decision in that case has been regarded as making a substantial change in the law. It may be that in the peculiar circumstances of the case the decision was correct. I do not have to decide that. But I entertain no doubt that the statements of principle made by the court (Slesser L.J., Scott L.J. and Farwell J.), if they are applied (as I think they were intended to apply) to the common case of a qualified repairing covenant, cannot be supported. I say "intended to apply" because the court expressly overruled the decision of a Divisional Court in *Haskell* v. *Marlow* [3] in which the court had, in what I have called the common case, given a narrower meaning and effect to such a covenant. In the latter case Talbot J., whose judgment I prefer to that of Salter J., said of such a covenant [4]: "The meaning is that the tenant (for life "or years) is bound to keep the house in good repair and condition, "but is not liable for what is due to reasonable wear and tear. "That is to say, his obligation to keep in good repair is subject "to that exception. If any want of repair is alleged and proved "in fact, it lies on the tenant to show that it comes within the "exception. Reasonable wear and tear means the reasonable use "of the house by the tenant and the ordinary operation of natural "forces. The exception of want of repair due to wear and tear "must be construed as limited to what is directly due to wear "and tear, reasonable conduct on the part of the tenant being "assumed. It does not mean that if there is a defect originally "proceeding from reasonable wear and tear the tenant is released "from his obligation to keep in good repair and condition every-"thing which it may be possible to trace ultimately to that defect. "He is bound to do such repairs as may be required to prevent "the consequences flowing originally from wear and tear from "producing others which wear and tear would not directly pro-"duce." The learned judge then quotes as an example the case of a tile falling off a roof and the consequential damage.

My Lords, I have quoted this passage at length because it states better than I could state it what I believe was always regarded as the law on this matter until *Taylor* v. *Webb* [5] was decided and should now be reinstated as the law by your Lordships' decision. In that case each of the three judgese directly disapproved of the reasoning of Talbot J. in *Haskell* v. *Marlow* [6] and in effect held that the clause relieved the tenant, not only from the immediate effects of wear and tear, but from the obligation to take any steps to avert any consequential damage. I think that the learned editor of the 25th edition of Woodfall on Landlord and Tenant was well justified in saying at p. 766: "It is open to question "whether this case [sc. *Taylor* v. *Webb* [7]] does not go too far as "a statement of principle and should be regarded perhaps as a "decision on the particular facts; the principle quoted from "Tindal C.J. seems to accord better with what draftsmen intend.

[3] [1928] 2 K.B. 45; 44 T.L.R. 171.
[4] [1928] 2 K.B. 45, 58–59.
[5] [1937] 2 K.B. 283.
[6] [1928] 2 K.B. 45.
[7] [1937] 2 K.B. 283.

" . . ." The quotation to which he refers is the well-known passage from *Gutteridge* v. *Munyard*.[8] The guarded observations of the Court of Appeal in *Brown* v. *Davies*[9] point in the same direction.

My Lords, can it, then, be said that in the present case the judge was wrong in principle in the force which he gave to the clause? He had before him the then binding decision in *Taylor* v. *Webb*[10]: he said that he must consider in due course the application of that decision to the circumstances of the case and, though, as I have said, it is not clear at least quantitatively how he applied it, I can see no ground for saying that in any sense adverse to the appellants his decision was based on any wrong principle. On the contrary, I can well understand the claim of the respondent that, if the learned judge, following *Taylor* v. *Webb*,[10] made his assessment on the footing that the tenant was relieved from all liability, not only in respect of an original defect, but also from all consequential damage, then he erred in principle in favour of the appellants. Therefore the second main ground of challenge fails.

But, my Lords, there is another aspect of this clause which has caused me much difficulty. It is closely linked with what I have called a subsidiary question which arises upon the first rule or regulation in the schedule. That has already been set out. The question was whether the fair wear and tear clause applied to the rule as well as to clause 2 (C) of the tenancy agreement in which it is to be found. The learned judge held that it did. The Court of Appeal held that it could not be read into rule 1 without qualification as it seemed inappropriate to the obligations in regard to various specific matters imposed by the rule. With this I agree. It would, for instance, be absurd to qualify damage caused " through improper use or negligence " by a fair wear and tear clause. On the other hand (agreeing again with the Court of Appeal), I see no reason why, reading the rule with clause 2 (C) as I must, since that clause specifically refers to " sanitary " and water apparatus," the fair wear and tear clause should not be applied to those matters to which it can properly be applied, i.e., to the opening words down to the words " proper repair and " order." And this, I think, is all that the learned judge in effect has done.

Finally, it has been said that the learned judge has erred in principle because in his enumeration of the items for which the tenant will remain liable notwithstanding the fair wear and tear clause he has included damage which falls within the exception provided by that clause. My Lords, it is obvious that it may be open to debate, whether any particular damage necessitating repair when it has occurred has been due to fair wear and tear

[8] (1834) 1 Moo. & R. 334.
[9] [1958] 1 Q.B. 117, 126–127; [1957] 3 W.L.R. 818; [1957] 3 All E.R. 401.
[10] [1937] 2 K.B. 283.

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or not. Still more is it open to debate whether when it occurs in the future it will be due to fair wear and tear. I should not myself say that it is impossible or even unlikely that some of the events enumerated might not be so due. But I do not think it is possible to say that the learned judge erred in principle in his enumeration and I think, therefore, that on this ground too the appeal fails. In the result the appeal should, in my opinion, be dismissed.

LORD MORTON OF HENRYTON. My Lords, the most important question arising on this appeal relates to the method to be adopted in ascertaining the "appropriate factor" specified in Part I of Schedule I to the Rent Act, 1957, in a case where, under the terms of the tenancy, the tenant is responsible for some, but not all, repairs. A minor question arises as to the true construction of the tenancy agreement made between the appellants as landlords and the respondent as tenant. The relevant facts are as follows:

The appellants are the owners of a large block of flats known as Chelsea Cloisters, comprising 804 residential flats of which 679 are let on unfurnished tenancies. The respondent is the tenant of one of these flats, No. 248, which was let to him unfurnished by a written tenancy agreement dated April 10, 1956. The flat consists of two rooms, a kitchenette, hall and bathroom with a radiator in each of the two rooms, a heated towel rail and a watercloset in the bathroom and a wash-basin and sink with hot and cold water taps in the bathroom and kitchenette respectively. The total area of the flat is 310 sq. ft.

The gross and rateable values of the flat are and were at all material times £54 and £39 respectively. By reason of its rateable value the flat was a dwelling-house controlled by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and continued to be controlled after the coming into force of the 1957 Act.

By the tenancy agreement, the appellants let the flat to the respondent, together with the use of all the fixtures and fittings therein, on a tenancy from month to month from April 1, 1956, at the yearly rent of £139 16s. 9d. At the commencement of these procedings the rent had been increased to £145 17s. 5d. by reason of increases in rates. The tenancy agreement provided (inter alia) as follows: [His Lordship read paragraph 2 (C) and (E), and rule 1 of the "Schedule of Rules and Regulations," and continued:]

At some time within a year before the commencement of the proceedings herein Plus Flats Management Ltd., the managing agents of the appellants, caused a circular letter in the following terms to be delivered to the tenants at Chelsea Cloisters:

"Dear Sir or Madam,

"re Water Taps

"In cases where taps require washering (that is to say where "water continues to drip when the tap is turned off) or re-seating "(where there is noise or vibration when the tap is turned)

" tenants are particularly requested to report this to the porter's " lodge, when the landlords will be pleased to effect repairs with- " out charge to the tenant."

On July 6, 1957, the Rent Act, 1957, came into force and introduced a limit on the rent recoverable in respect of houses let under a controlled tenancy, which was to be ascertained on a different basis from that laid down in previous Rent Acts. The provisions of the 1957 Act which are material to this appeal are as follows: Section 1 (1): " Subject to the following provisions of " this Act the rent recoverable for any rental period from the " tenant under a controlled tenancy shall not exceed the following " limit, that is to say, a rent of which the annual rate is equal " to the 1956 gross value of the dwelling multiplied by two (or, " if the responsibility for repairs is such as is specified in Part I " of Schedule I to this Act, by the appropriate factor specified " in the said Part I), together with—(*a*) the annual amount, " ascertained in accordance with Schedule II to this Act, of any " rates for the basic rental period, being rates borne by the land- " lord or a superior landlord; and (*b*) such annual amount as " may be agreed in writing between the landlord and the tenant " or determined by the county court to be a reasonable charge for " any services for the tenant provided by the landlord or a " superior landlord during the basic rental period or any furniture " which under the terms of the tenancy the tenant is entitled to " use during that period."

No question arises on this appeal under sub-paragraphs (*a*) and (*b*) as these matters have been agreed between the parties.

Section 1 (2): " The limit on the rent recoverable under a con- " trolled tenancy for any rental period (hereinafter referred to as " ' the rent limit ') shall be subject to adjustment from time to " time under sections 3 to 5 of this Act and to reductions " as provided by Part II of Schedule I to this Act in case of " disrepair."

Section 25 (so far as relevant) is in the following terms: " . . . " ' appropriate factor ' means the number by which the 1956 gross " value is to be multiplied in determining the rent limit; ' basic " ' rental period ' means the rental period comprising the com- " mencement of this Act or, in the case of a controlled tenancy " beginning thereafter, the first rental period of the tenancy; " ' controlled tenancy ' means a tenancy to which Rent Acts " apply, or a statutory tenancy; ' dwelling ' except in section 16 " of this Act, means in relation to a controlled tenancy the aggre- " gate of the premises comprised in the tenancy . . ."

Schedule I, Part I, provides: " 1.—(1) The following pro- " visions shall have effect in ascertaining the rent limit by " reference to the 1956 gross value. (2) If under the terms of " the tenancy the tenant is responsible for all repair, the appro- " priate factor shall be four-thirds. (3) If under the terms of the " tenancy the tenant is responsible for some, but not all, repairs, " the appropriate factor shall be such number less than two but

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" greater than four-thirds as may be agreed in writing between " the landlord and the tenant or determined by the county " court."

It will be observed that the present case comes within paragraph 1 (3).

Paragraph 2 (1) provides: " In the foregoing paragraph the " expression ' repairs ' does not include internal decorative " repairs . . ." The remainder of paragraph 2 relates to internal decorative repairs, which are not relevant to this appeal.

Part II of Schedule I enables a tenant, in the circumstances therein set forth, to obtain a " certificate of disrepair " from the local authority, with a consequential reduction of the " appro- " priate factor " to four-thirds while the certificate is in force.

No agreement was made between the parties, under paragraph 1 (3) of Schedule I, as to the appropriate factor for ascertaining the rent limit applicable to the flat and on July 22, 1957, the appellants issued an application in the West London County Court for a determination of the appropriate factor under paragraph 1 of Schedule I to the 1957 Act. At the hearing of the application expert evidence was called on behalf of the appellants and the respondent respectively with regard to the estimated yearly expenditure on repairs (other than internal decorative repairs) which would be incurred in respect of the flat, and the relative proportion thereof which would fall on the appellants and the respondent having regard to the repairing provisions of the tenancy agreement.

The learned county court judge accepted the evidence tendered on behalf of the appellants in part and the evidence tendered on behalf of the respondent in part, and held that the appellant landlords' liability for repairs should be estimated at £7 5s. per annum and the respondent tenant's liability at not less than £7 7s. per annum.

After giving his reasons for arriving at the figure of £7 5s. per annum in respect of the landlords' liability, the learned judge continued as follows:

" In my view, however, the tenant's liability should be put " at a far higher figure than the £2 10s. that Mr. Dale allows, " even taking into account the fair wear and tear clause, as of " course I must do. My reason for forming this opinion is that " in the case of a flat such as this, where most of the fixtures " and fittings are metal or porcelain, or where all are indoors, " the fair wear and tear will be very small and may be regarded " in some cases as almost negligible. The main articles that " will have to be replaced by the landlord under the fair wear " and tear clause are the electric light bulbs and the washers on " the taps. These latter the landlord has specifically undertaken " to be responsible for by circulating the undated slip to which I " have already referred, although it appears to me that under the " fair wear and tear clause the landlord will be liable for this in " any case.

"The tenant, however, remains liable for all the rest of the "repairs inside the flat. I have in mind such items as the "following: (A) keeping waste pipes unblocked, and (B) repair- "ing basins cracked by dropping articles into them, for example, "tooth glasses, bottles, hairbrushes or tumblers; breaking the "chain or the handle, or whatever the contrivance is, of the "lavatory cistern, chipping the bath enamel; repairing damage "to the walls caused, for example, by driving in nails or Rawl- "plugs for pictures and photographs; breaking the bath panel or "a window pane; damage to the fittings of the kitchenette; "damage to the woodwork from cigarette ends, where more "serious than mere decoration can repair; and, more rarely, "damage from the flooding of his own or adjoining flats.

"All these are the sort of things that happen in flats, and they "cannot be regarded as fair wear and tear. I take the view that "even allowing for the fair wear and tear clause the tenant's "liability should be assessed at not less than £7 7s. per annum "in all. This view does not necessarily conflict with Mr. Dale's "figures, because tenants who do damage which is obviously not "fair wear and tear have no motive for reporting it, and are more "than likely to put it right without the landlord knowing any- "thing about it. If they do report it the landlord's manager will "probably tell them that the landlord is not responsible for the "carelessness of the tenant.

"As I take the view, therefore, that as nearly as I can form "an estimate, the cost of repairs to the dwelling is shared about "equally between the landlord and tenant, I hold the appropriate "factor to be $1\frac{2}{3}$ of the gross-value, that is to say, £54, plus £36. "The rent currently applying in the case of this flat, therefore, "will be £90."

The learned judge further held that, on the true construction of clause 2 (C) and rule 1 of the schedule to the tenancy agreement, "the tenant is responsible for everything set out in "the clause and the rule, but he may excuse himself if he can "show that the damage in respect of which the landlord is "seeking to make him liable is due to fair wear and tear."

The appeal of the appellants to the Court of Appeal was dismissed.

My Lords, it was common ground between the parties that the learned judge was right in the course which he pursued of "estimating the sums which each party would have to spend per annum on repairs, under the terms of the tenancy, and fixing the appropriate factor on this basis; and I add that the words "under the terms of the tenancy" in Part I of Schedule I must, in my view, apply equally to an oral and a written tenancy agreement. The court must first ascertain what obligations as to repair are placed upon the tenant under the terms of the tenancy and then estimate the annual cost of carrying out these terms. It is also common ground that on the figures at which the learned judge arrived he was right in fixing the appropriate factor at $1\frac{2}{3}$

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of the gross value, that figure being, of course, exactly halfway between the maximum of 2 and the minimum of 1½. It was, however, contended on behalf of the appellants that the learned county court judge fell into an important error of principle in assessing the tenant's liability for repairs under the terms of the tenancy at "not less than £7 7s. per annum," because he took into account repairs rendered necessary by conduct of the tenant which would be a breach of his obligations at common law.

My Lords, I would reject this contention, for the reasons given by Pearce L.J. in delivering the judgment of the Court of Appeal, but I have felt considerable doubt as to whether the learned judge did not go wrong in a different way. It is clear that the amount which any tenant will have to spend on repairs in a year, under the terms of his tenancy, depends in part upon how far the terms of his tenancy make him liable for repairs, in part upon the nature of the property let, and in part upon the behaviour of the tenant. Thus, in estimating this sum, the court must assume a tenant of a particular type. This was recognized and accepted by counsel for appellants and respondent when the appeal was further argued on October 21, 1958. It was not suggested by either side that the court should investigate the personal qualities of the person who is in fact the tenant at the time when the estimate has to be made. Apart from the difficulties involved in carrying out such an investigation, it was pointed out by counsel for the appellants that, once the court has determined the "appropriate factor" in respect of any premises it remains binding so long as these premises are subject to rent control, subject to the effect of any certificate of disrepair which may be granted under Part II of Schedule I to the Act.

My Lords, in my opinion the type of tenant who should be assumed for the purposes of the calculation now under consideration is a tenant who is reasonably careful in his user of the premises. I can see no good reason why the legislature should have had any other type of tenant in mind when it placed upon the court the task of determining the "appropriate factor"; a task which must obviously involve estimating the burden of the repairs for which the landlord and the tenant respectively are "responsible under the terms of the tenancy." It would surely be wrong for the court, in estimating the burden on the tenant under these terms, to do so upon the footing that the tenant will make that burden heavier by reckless behaviour or wanton destruction.

I recognize, however, that even the reasonably careful tenant may have moments when he acts in a negligent way, and damage may be done by negligent acts of his wife (if any), children (if any), servants and agents. I think that a county court judge is justified in making some allowance for the possibility of such events happening. In my opinion, however, the learned judge in the present case has taken too gloomy a view of the conduct to be attributed to the hypothetical tenant, and the "sort of

"things which are likely to happen" in this little two-roomed flat, as set out in the list of items, which I have quoted from his judgment.

For this reason, I was at one time disposed to think that the present case should be remitted to the county court, for reconsideration of the figure of £7 7s.; but when this appeal was further argued on October 21 I found that counsel for the appellants did not wish to ask for such an order unless your Lordships were of opinion that every repair rendered necessary by negligence should be excluded from the calculation. This would involve imagining a tenant who is never at any time negligent during the whole course of his tenancy, and attributing a similar perfection of behaviour to his spouse (if any), children (if any) and servants or agents. I cannot find in the Act any justification for this.

I now turn to an argument submitted by counsel for the respondent. In the course of his judgment the learned judge said: "My attention has been drawn to the case of *Taylor* v. "*Webb*,[11] but it must be remembered that the damage under "consideration in that case was due to the state of the outside "of a house exposed to the elements." Later he observed: "It is the application of this decision to the circumstances of the "present case that I shall have to consider in due course." In fact the learned judge did not refer again to *Taylor* v. *Webb*,[11] but counsel for the respondent contended (1) that he must be taken to have applied the principles laid down in *Taylor* v. *Webb* [11] in arriving at the figure to be ascribed to the "fair wear "and tear" exception in clause 2 (C) of the tenancy agreement; (2) that *Taylor* v. *Webb* [11] wrongly overruled *Haskell* v. *Marlow* [12]; (3) that the view expressed by Talbot J. in *Haskell* v. *Marlow* [13] as to the effect of a "fair wear and tear" exception is to be preferred to the views expressed by the members of the Court of Appeal on the same topic in *Taylor* v. *Webb*.[14] Accordingly, counsel for the respondent submitted that if for any reason the case is referred back to the learned judge—though they were quite willing to accept his findings as they stood—he should be directed to reconsider the figure to be ascribed to the "fair wear and tear" exception in the present case in accordance with the view of Talbot J. just mentioned.

I understand that your Lordships are all inclined, as I am, to accept the contentions just stated. I think, however, that in a case such as this, where the obligations of the tenant relate solely to the interior of the premises, where no question of interior decoration arises, and where "the premises" are a small modern flat, it can hardly make any difference to the practical result whether the judge applies the view of Talbot J. in *Haskell* v. *Marlow* [15] or the view of the Court of Appeal in *Taylor* v. *Webb*,[16]

[11] [1937] 2 K.B. 283.
[12] [1928] 2 K.B. 45.
[13] Ibid. 58, 59.
[14] [1937] 2 K.B. 283.
[15] [1928] 2 K.B. 45.
[16] [1937] 2 K.B. 283.

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and I am not surprised that counsel for the respondent are willing to accept his findings.

Two further questions were considered in the course of the argument. First, did the "fair wear and tear" exception in clause 2 (C) of the tenancy agreement apply to the obligations imposed on the tenant by clause 2 (E) and rule 1 of the schedule? This exception is not mentioned in either of these two parts of the document, but the obligations in clause 2 (C) include an obligation "to keep the sanitary and water apparatus" of the flat "in "good and substantial repair and condition," with a "fair wear "and tear" exception. This being so, I think that the same exception must apply to the opening words of rule 1, down to "proper repair and order," since these words deal, in substance, with the same subject-matter. I do not think that this view is in conflict with the views expressed in the county court and the Court of Appeal. Even if the learned judge intended to apply the exception to the whole of rule 1, I do not think it likely that this error affected in any way the figure of £7 7s. already mentioned.

The second question related to the effect (if any) of the circular letter, already set out, upon the obligations of the tenant as to repairs. Counsel on both sides agreed, however, that if your Lordships took the view with which I have just expressed my agreement, the duty as to washering or reseating taps would be a "repair" to which the "fair wear and tear" exception applied.

For these reasons, my Lords, I would dismiss the appeal.

LORD TUCKER. My Lords, the main question in issue in this case in the Court of Appeal and as originally presented to your Lordships by counsel for the appellant company was whether the learned county court judge had correctly construed the words "if "under the terms of the tenancy the tenant is responsible for "some, but not all, repairs" in paragraph 1 (3) in Part 1 of Schedule I to the Rent Act, 1957, for the purpose of fixing "the "appropriate factor" with a view to determining the rent limit of the flat in question.

The contention was that the learned judge erred in including in the repairs for which the tenant was responsible under his tenancy agreement those repairs for which he would have been responsible at common law apart from and irrespective of his express obligations under his agreement.

This raised a pure question of law of wide importance and eminently suitable for determination by the Court of Appeal. It was rejected—and, in my opinion, rightly rejected—by that court in the following words [17]:

"The question is whether in law he could properly throw those "occurrences into the tenant's scale as matters for which the "tenant was responsible under the terms of the agreement. They "were in fact matters for which he was so responsible. Mr.

[17] [1958] 1 Q.B. 346, 358–359.

" Lawson argues that the tenant's liability for them at common " law makes it incorrect to describe them as a responsibility " under the terms of the agreement. We cannot accept that " argument. Such repairs are in fact a responsibility under the " express terms of the agreement. The fact that there may be " a concurrent liability at common law does not alter that fact. " If one applies the test of common sense and practice, one can " hardly imagine a landlord claiming against a tenant in respect " of them other than under the express covenant."

My Lords, I start by asking myself what, apart from actions for waste, are the common law remedies of a landlord against a tenant for damage resulting from the negligent use of the demised premises by the tenant. Neither counsel was able to cite any case in which any such action had ever been brought. Negligence involves a breach of duty and I should have supposed that the measure of that duty arising out of the relationship of landlord and tenant was to be found in the express terms of the contract between the parties or in the covenants which the law over the years has implied from that relationship in certain types of tenancy, e.g., the letting of furnished premises, weekly tenancies and yearly tenancies. However this may be, I will assume for present purposes that some such action would lie at common law either concurrently with the remedy for breach of contract or in lieu thereof where there is no express contract. In such an action the tenant clearly would not be responsible for the negligent acts of his children or his guests, and for damage so caused the landlord would have to rely on his contractual rights. What should the county court judge have done with regard to repairs due to such causes? Should he have excluded them, together with those which were due to the negligence of the tenant or his servants, or should he have made a separate calculation with regard to each category and have excluded one and included the other?

My Lords, such problems do not, in my view, arise out of the language of the Schedule. The words " repairs for which the tenant is responsible " must have the same meaning in paragraph 1 (2) and paragraph 1 (3); it is only the quantum that differs. I can find no justification for giving the words " all repairs " any meaning other than their natural and ordinary meaning of all repairs whatever the cause of the disrepair and regardless of any concurrent remedies available to the landlord for the enforcement of the tenant's obligations. The only justification, as I understood the argument, for giving a limited meaning to the words was said to be found in the language of Part 2 of the Schedule and in particular to paragraph 15 thereof which provides that references in that Part of the Schedule to defects for which the tenant is responsible are references to defects for the remedying of which, as between the landlord and the tenant, the tenant is responsible, to defects which are due to any act, neglect or default of the tenant or any person claiming under him or any breach by the tenant or such person of any express agreement. The precise

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effect of these words may require consideration on some future occasion when the cancellation of a certificate of disrepair is in question, but I do not think they can justifiably be called in aid in order to qualify the plain language of a different Part of the Schedule dealing with a different subject-matter, viz., the ascertainment of the appropriate factor as distinct from the procedure laid down in Part 2 for the abatement of disrepair and the grant and cancellation of certificates of disrepair.

My Lords, I agree with the Court of Appeal in thinking that this contention of the appellant company was rightly rejected by the county court judge.

At a late stage of the hearing counsel for the appellant company advanced an alternative argument leading to the same result by a different process which does not involve doing violence to what I regard as the clear language of the Schedule. He said that you look at the express language of the tenancy agreement to ascertain whether it falls within paragraph 1 (3) of the Schedule and if it does you then proceed to evaluate the quantum. This entails envisaging a hypothetical tenant and in the present context such a tenant is one who throughout his tenancy is never guilty of negligence in relation to his user of the premises and whose servants or agents are equally blameless. This tenant he described as " a reasonably careful tenant." Mr. Megarry for the respondent, whilst disposed to accept the description of the hypothetical tenant as " reasonably careful " submitted that such a tenant would from time to time be liable to fall below the standard of perfection required from Mr. Lawson's hypothetical tenant and consequently a certain degree of negligence on his part or on the part of those for whom he is responsible is to be expected.

My Lords, as counsel on each side by adopting the same words of description arrive at such different results, it makes me doubt whether the words " a reasonably careful tenant " are very apt to describe this hypothetical person. However, as I understand some of your Lordships are of opinion that this is the proper test, I would not quarrel with this description, provided it is made clear that Mr. Megarry's interpretation is the right one and that perfection is not to be attributed to this hypothetical tenant who is, I think, to be taken to be of the type who may reasonably be expected to occupy identified premises in a particular locality on the terms of the agreement in question. I can find nothing in the judgment of the learned county court judge which leads me to doubt that this is the test which he applied. There is, in my opinion, no justification for inferring that he intended to attribute to the tenant all the acts enumerated by him towards the end of his judgment. They are merely examples of the kind of things some of which might be expected to occur during the tenancy and for which, if they did occur, the tenant would be responsible. I think the figure of £7 7s. 0d. at which he fixed the tenant's total liability makes this quite clear. Furthermore, the passage in his judgment at p. 8 of the Record

where he says: " I must, therefore, regard the agreement as one " that repudiates specifically the assumption that tenants can be " relied upon always to be careful. It assumes instead that there " may be some who are not," although founded upon the language of the particular agreement, clearly indicates the type of hypothetical tenant envisaged by him.

It is said that unless you exclude repairs due to negligence it follows that the greater the degree of negligence attributed to the hypothetical tenant the lower will be his rent. If this is illogical it is the fault of the statute and is no justification for reading into the Act words which are not there or endeavouring to reach the same result by assuming a perfect tenant and concealing his perfection by describing him as " reasonably careful." Surely there can be no justification for assuming that the conduct of the tenant will be either extremely good or extremely bad and it would seem to be equally illogical that the better his anticipated conduct the higher will be his rent. To me the conclusion seems irresistible that the hypothetical tenant must be the ordinary average man with all his imperfections and liability occasionally to fail to maintain that standard of care which the law requires of him in his relation to his neighbours.

With regard to the application of the fair wear and tear exceptions, I agree that the judgment of Talbot J. in *Haskell* v. *Marlow* [18] is to be preferred to the judgments of the Court of Appeal in *Taylor* v. *Webb* [19] in so far as questions of principle are involved and that to this extent the latter case should be regarded as overruled. I find it difficult, however, to ascertain in what way the application of the decision in *Taylor* v. *Webb* [19] affected the computation made by the learned judge, and I agree that if he erred at all it was probably in favour of the appellants.

My Lords, with regard to the question of the application of the fair wear and tear exception to rule 1 of the schedule to the tenancy agreement, and to the criticism directed to the inclusion of some of the specific items enumerated by the county court judge, I am in agreement with the views which have been expressed by my noble and learned friend on the Woolsack and have nothing to add thereto.

For these reasons I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, this appeal falls to be decided, in my opinion, on a very short point. The question is how the county court judge is to determine the basic rent of the demised premises, having regard to the terms of the tenancy agreement. This is not a matter on which absolute precision is possible in the intermediate class of case where the tenant is liable for some, but not all, repairs as here. At opposite ends of the scale no difficulty arises. If the tenant is liable for no repairs the " appropriate factor " is two (section 1 of the Act). If the tenant is liable for all repairs the " appropriate factor " is

[18] [1928] 2 K.B. 49. [19] [1937] 2 K.B. 283.

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four-thirds (paragraph 1 (2) of Schedule I). In the intermediate class the "appropriate factor" has to be determined by the county court and if the judge proceeds on proper principle his figure can hardly be challenged.

In the present case the learned county court judge, in the course of his judgment, said this: "There is, however, a further "consideration that I am asked to take into account regarding "repairs arising through negligence, and it is this. It is sub- "mitted that in construing this agreement it should be assumed "that the tenant will be a reasonably careful tenant, that is to "say, not a negligent one, and that the negligence clause can "therefore be disregarded. It might be possible to accept this "argument in the case of an agreement that was silent as to "the tenant's negligence. It might then, I think, be argued "that it should be assumed that when the agreement was drawn "up the landlord had in mind only tenants who would behave "with reasonable care, but this agreement is not silent; it quite "obviously assumes and takes into account the possibility that "the tenant or his servants may be negligent and it formulates "provisions to apply in such a case. I must, therefore, regard "the agreement as one that repudiates specifically the assump- "tion that tenants can be relied upon always to be careful. It "assumes instead that there may be some who are not." From his catalogue in a later part of his judgment of the sort of things that happen it is clear, I think, that to some extent he has applied the view so expressed. In my opinion, he has here misdirected himself.

The question, as I see it, is not what the particular tenant would be responsible for in the event of his negligence. Even if he were under no repairing obligations he would, in my opinion, be liable for disrepair caused by negligent treatment of the demised premises. The question is how is the quantum of repair to be fairly allocated between landlord and tenant in light of the repairing covenants imposed by the tenancy agreement. The terms of the agreement are material as showing the scope of the repairs that may be expected to fall on the landlord and tenant respectively.

There are references in rule 1 of the "Schedule of Rules and "Regulations" to negligence of tenants or their servants. These, I think, refer to negligence in the use of baths and other sanitary fittings and seem intended to cover consequential damage to the demised premises or to other flats. This seems a very natural clause for the protection of the landlord, though it adds, I think, nothing to the liability which would attach to the tenant in any case apart from the clause. The reference to "other flats" would seem also to put it into a special character of stipulation outside the ordinary repairing covenant. But whatever the clause means it cannot be taken to warrant the assumption that the landlord contemplates a negligent tenant or is granting to the tenant a charter to be negligent.

It was accepted as common ground and, in my opinion, rightly so that the tenant to be regarded is not any particular tenant, but a hypothetical tenant. That tenant must, in my opinion, be taken to be a reasonably careful tenant not given to acts of negligence in his treatment of property or to untenant-like conduct. That is not to say that regard may not be paid to the ordinary mischances and accidents that may occur in any house from inadvertence.

The assumption of such a hypothetical tenant is, in my opinion, a necessity to give any coherence or certainty in the operation of the provisions of the Act. The appropriate factor cannot depend on the reputation of the particular tenant or on the neighbourhood in which the dwelling-house is situated or on an estimate of the conduct of people who stay in or are allowed to visit the house. If negligence were to be treated as a matter to be taken into account, how much negligence is to be assumed? The repair bill is clearly going to vary in proportion to the estimate of the amount of negligence. Some tenants might be grossly negligent, some might be less negligent and some might not be negligent at all. It is impossible to strike an average of negligence and even if it were it would not be appropriate to all types of tenant and all classes of property. To introduce negligence would also mean that a negligent tenant would benefit by getting a lower appropriate factor, and the greater the negligence assumed the lower would be the appropriate factor within the statutory limits.

Negligence must, in my opinion, be entirely excluded in computing the appropriate factor. The appropriate factor must be computed on the assumption of a tenancy by a hypothetical tenant removed from all considerations of negligence. I would accordingly allow the appeal and remit the case to the county court for further consideration. On the other points in the case I agree with what has been said and have nothing to add.

LORD DENNING. My Lords, we are here concerned with the rent which should be paid by the tenant of a small flat which is still controlled by the Rent Acts. In the Rent Act, 1957, Parliament has done away with the old standard rent, and has prescribed instead a "rent limit" for controlled houses. It has laid down a formula for calculating this "rent limit." This formula, naturally enough, takes account of the "responsibility for "repairs." The rent limit goes up or down according as the burden of repairs falls on the landlord or the tenant. This adjustment up and down is effected by means of a variable multiplier called the "appropriate factor" which works in this way: In applying the formula, you start with the 1956 gross value of the dwelling. Then you multiply it by 2 or by $1\frac{1}{3}$—or by something in between—according to the "responsibility for repairs." You find this multiplier by seeing what is the responsibility for repairs which falls on the tenant under the terms of the tenancy. If the

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tenant is responsible for all repairs, the multiplier is $1\frac{1}{3}$. If he is not responsible for any repairs, the multiplier is 2. If he is responsible for some, but not all, repairs, the multiplier is such number less than 2 but greater than $1\frac{1}{3}$ as may be agreed by the parties or determined by the county court.

The formula does not thus far take any notice of the responsibility of the landlord for repairs: but it is to be observed that the Act contains provisions whereby "in case of disrepair" the tenant can get the multiplier reduced to $1\frac{1}{3}$. The result is that, if the landlord wishes to receive the full rent permissible under the rent limit, he must remedy any defects for which the tenant is not responsible.

One other thing to be noticed is that the expression "repairs" in the formula does not include internal decorative repairs. If under the express terms of the tenancy, the landlord is responsible for internal decorative repairs, he can put up the multiplier by another $\frac{1}{3}$, so that the top multiplier, for instance, becomes $2\frac{1}{3}$ instead of 2.

So far there is no difficulty. The trouble arises when you ask—What is the proper way to calculate the "appropriate "factor"? It is easy enough at the two extremes. When the tenant is under an express obligation to keep the dwelling "in "repair," or "in good repair," or "in good tenantable repair," or "in good and substantial repair," or any such like phrase (with no exception for fair wear and tear or anything else) the multiplier is $1\frac{1}{3}$. When the tenant is not under any express obligation to do any repairs at all, the multiplier is 2. But what is the position when the tenant is expressly liable for "some, but "not all, repairs," as, for instance, in the ordinary case when he is liable to keep the premises in good repair, fair wear and tear excepted? The Act says that, in the absence of agreement, the county court judge is to determine the "appropriate factor" but gives him no guidance as to how to do it.

It is, I think, plain that you must take a hypothetical tenant and assess the responsibility for repairs by estimating what would be the annual cost of the repairs falling on him and what on the landlord. But this leaves the question—What sort of hypothetical tenant are you to take? Are you to take a rough tenant who knocks the place about? or a perfect tenant who never breaks anything? or an average tenant who comes somewhere in between?

Or, to put the question in another way—What defects are you to take into account in making the calculation? In particular, are you to take into account breakages due to the tenant's fault? Suppose, for instance, that the tenant negligently drops a bottle into the washhand basin and breaks it: or suppose that he does not keep his children under proper control and one of them throws a stone through the window. Are you to take breakages of that kind into account when ascertaining the rent limit? A rough tenant will have a lot of such breakages. A perfect tenant none. An average tenant will have some but no one can say how many.

If breakages of this kind are to be taken into account, it will produce a strange result. The judge will have to estimate the annual cost of such breakages to the average tenant and bring it into the calculation in the tenant's favour (as being part of the repairs for which the tenant is responsible) with the result that the tenant will pay a lower rent on account of them. I can see no sense in this. I can see no reason why the landlord should receive less rent—or the tenant pay less rent—simply because the tenant may be expected, in the ordinary course of things, to break windows, wash-basins and the like.

After a close consideration of the Act, I have come to the conclusion that, in calculating the rent limit, you ought not to take into account breakages which are due to the tenant's own fault: for the simple reason that the Act envisages a hypothetical tenant who uses the dwelling in the way that he ought to use it—in the way that the common law expects and requires him to use it—that is to say, a tenant who commits no waste (by which I mean no voluntary waste) and who uses the dwelling in a tenant-like manner, and who does not break any agreement he has made as to his use of it. Such a tenant—you may call him a perfect tenant if you like but I would call him a reasonable tenant—does not damage the place, wilfully or negligently, he does not break windows or wash-basins, or if he does, he puts it right at his own expense without troubling the landlord about it.

To prove that such is the kind of tenant envisaged by the Act, I would first take a case where the tenancy agreement contains *no express provision* about repairs at all. It was conceded on all hands that in such a case the multiplier is 2. The reason is because there is no term of the tenancy—express or implied—which requires the tenant to do any repairs at all. He is not therefore, under the terms of the tenancy, responsible for any repairs—not even for "some" of them. But, nevertheless he is, by the common law, under an obligation not to commit waste, that is to say, voluntary waste; and he is also under an obligation to use the premises in a tenant-like manner. As I pointed out in *Warren* v. *Keen*,[20] those are not obligations to repair. They are obligations as to his conduct, and user of the premises, and so long as they are fulfilled, as they ought to be, no question of repair arises. It is true, of course, that if the tenant breaks those obligations—as, for instance, if he commits waste by removing partitions or walls (*Marsden* v. *Edward Heyes Ltd.*[21]) or if he uses the premises in an untenant-like manner by breaking windows or doors (*Ferguson* v. *Anon*[22])—he must execute repairs or else pay damages. But in doing so he is not fulfilling an obligation to repair under the terms of the tenancy, express or implied. He is only remedying his own breaches of his common law obligations as to conduct and user. These obligations are altogether separate and distinct from those imposed by a covenant to

[20] [1954] 1 Q.B. 15, 20; [1953] 3 W.L.R. 702; [1953] 2 All E.R. 1118.

[21] [1927] 2 K.B. 1.

[22] (1798) 2 Esp. 590.

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repair and give rise to separate and distinct remedies, see *Kinlyside* v. *Thornton*,[23] a case of waste, but the same applies, I think, to use in a tenant-like manner. I do not think *Standen* v. *Christmas* [24] was correctly decided on this point.

Take next a case where the tenant *expressly* agrees not to commit waste and *expressly* agrees to use the premises in a tenant-like manner. The multiplier is still 2. It would obviously not be right to reduce it simply because the tenant's obligations are express and not implied or imposed by law.

It is quite clear, therefore, that the landlord is given the multiplier of 2 on the basis that the hypothetical tenant is a tenant who commits no waste and uses the premises in a tenant-like manner: and that, if the tenant breaks those obligations, he remedies them at his own expense without any effect on the rent.

Thence the multiplier goes down on a sliding scale from the highest factor 2 to the lowest factor $1\frac{1}{3}$: but it is obvious that it must proceed on the same basis all the way down the scale—namely, that at every point the hypothetical tenant must fulfil his common law obligations as to conduct and user, and must, therefore, himself remedy defects due to his own fault—and that he is only entitled to have the rent limit reduced by a lower factor than 2 according as more and more repairs fall on him by the express terms of the tenancy over and above those due to his own fault.

There is another reason why I say the Act envisages a tenant such as I have described. If you turn to the provisions which enable a tenant to get the rent limit reduced "in case of "disrepair," you will find that he cannot get it reduced for breakages due to his own fault—see paragraphs 4 (4) and 15 of Schedule I. The underlying assumption clearly is that, during the continuance of the tenancy, the tenant should remedy his own breakages himself at his own expense without affecting the rent limit at all. If that assumption is to be made when *continuing* the rent limit, surely it should also be made when *fixing* it. It would be absurd, *after* the tenancy has started, to reduce the rent because the tenant breaks the washhand basin. So also it would be absurd, *before* the tenancy has started, to fix the rent at a reduced level because the tenant—or rather a hypothetical tenant—might thereafter break a wash-basin.

Mr. Megarry objected to this line of argument. He said that paragraph 15 is confined to "this part of this Schedule," i.e., to Part II, which deals with abatement for disrepair: and that it cannot be called in aid to construe Part I which deals with adjustment of rent limit. This is, I think, too narrow a view. The provisions of Part I can only properly be understood when they are placed in the context of the Act as a whole, and this includes Part II. Take, for instance, the question whether, in ascertaining the appropriate factor for a flat, it is permissible

[23] (1776) 2 W.Bl. 1111. [24] (1847) 10 Q.B. 135.

to take into account the cost to the landlord of repairing any defects in the common roof or staircase. There is nothing to help in Part I. The "responsibility for repairs" ordinarily means repairs to the dwelling itself which is let. But in Part II there is paragraph 13 (also expressed to be "for the purposes "of this part of this Schedule") which shows that, in a block of flats, any disrepair of the common roof or common staircase is to be treated as disrepair of the dwelling and entitles the tenant to a reduction in the rent limit. The landlord must therefore remedy any defects in the common roof or staircase if he wants to keep his full rent. It is reasonable to infer that the cost of this work is part of the burden of repairs which falls on the landlord and must be taken into account in the calculation so that he gets a higher rent on account of it. It was so taken into account by the judge in this very case and he relied on paragraph 13 for the purpose. I think he was right in so doing. And paragraph 15 can likewise be used so as to show what breakages can properly be taken into account. I decline to put on one side a most useful pointer to the intention of Parliament which is contained in this very Act.

Thus far I have considered only breakages due to the tenant's own fault, that is, damage done to the dwelling by the tenant himself, wilfully or negligently. Such damage is clearly a breach of his common law obligations and must be excluded from the calculation for the reasons I have given. But what about breakages due to the fault of his family or his guests? These seem to me to stand on the same footing as his own breakages. No reasonably-minded tenant expects his landlord to pay for breakages caused by the negligence of himself or his family or his guests. He expects to pay for them himself: and in law he is, I think, bound to do so without any express stipulation in that behalf. This is because he is under an obligation to use the dwelling in a tenant-like manner, and this obligation, properly understood, extends not only to his own use of the dwelling but also to the use made of it by those claiming under him. After all, if they do damage to the premises, wilfully or negligently, the tenant can recover the full damage from them. He can rely on his possession for this purpose: for as against them, his possession is title. He is, of course, unable to sue his wife, but that is a rule of procedure, not of substance, and does not affect the principle. It is only reasonable, therefore, that the tenant should be accountable to the landlord for the damage done by them. This was clearly the view of the experienced surveyor for the tenant Mr. Russell-Davies, who said in evidence: "I had no thought that anybody but the tenant "would be liable for rough treatment or negligent treatment." It was the same view as I expressed a few years ago in *Warren* v. *Keen* [25] when, speaking of the tenant's obligations, I

[25] [1954] 1 Q.B. 15, 20.

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said: "He must, of course, not damage the house, wilfully or "negligently; and he must see that his family and guests do not "so damage it: and if they do, he must repair it."

It follows that the hypothetical tenant envisaged by the Act is a tenant who does not himself damage the dwelling, wilfully or negligently, nor does anyone claiming under him so damage it: and the rent limit must be calculated on that footing. This fits in well with paragraph 15, which says that the tenant cannot get the rent limit reduced for "defects which are due to any "act, neglect or default of the tenant, *or any person claiming* "*under him.*"

I would also point out that, if the tenant expressly agrees to use or not to use the premises in a particular way, as for example, not to drive nails into the wall—and he breaks his agreement—he cannot bring in the cost of remedying it as an item in his favour. He cannot get the rent limit reduced on that account, see paragraph 15; and he cannot claim to have a lower rent fixed on account of it — or the possibility of a hypothetical tenant doing it.

The next question is what is the effect of the exception of "fair wear and tear" in a repairing covenant. I find myself in full agreement with what Talbot J. said on this subject in *Haskell* v. *Marlow*.[26] I think the Court of Appeal in *Taylor* v. *Webb*[27] were wrong in overruling *Haskell* v. *Marlow*.[28] I have never understood that in an ordinary house a "fair wear and "tear" exception reduced the burden of repairs to practically nothing at all. It exempts a tenant from liability for repairs that are decorative and for remedying parts that wear out or come adrift in the course of reasonable use, but it does not exempt him from anything else. If further damage is likely to flow from the wear and tear, he must do such repairs as are necessary to stop that further damage. If a slate falls off through wear and tear and in consequence the roof is likely to let through the water, the tenant is not responsible for the slate coming off but he ought to put in another one to prevent further damage.

The third question is whether rule 1 is subject to the exception of "fair wear and tear." In so far as the rule covers the same field as clause 2 (D)—that is, in respect of sanitary and water apparatus—it is subject to the exception, because the clause in the deed must take precedence over the rule. It follows that when the washer on a tap wears out and has to be remedied, or a cistern has to be regulated, or a radiator leaks, the tenant is not liable, because it is fair wear and tear. The defect must be made good by the landlord if he wants to get his full rent. It is part of the burden which falls on him. The circular which the landlord sent round to the tenants recognizes this burden and does not need separate consideration. In so

[26] [1928] 2 K.B. 45.
[27] [1937] 2 K.B. 283.
[28] [1928] 2 K.B. 45.

far as the rule refers to damage occasioned by improper use or negligence of the tenants or their servants, this is not "fair "wear and tear" and the tenant must put it right: but the cost does not come into the calculation for the reasons I have already given. In so far as the rule refers to notices served by the water and sanitary authorities, these are all due, as Mr. Dale said, "to plumbing and to leaks," that is, to sanitary and water apparatus. These are, therefore, like the first part of the rule, subject to the exception of fair wear and tear, and the cost of remedy forms part of the landlord's burden.

This brings me to a consideration of the judgment of the county court judge. He seems to have made his calculation in this way:

1. He took the estimated annual cost of repairing the roof and exterior of this block of flats and of the common lifts and staircases: and he apportioned it to this flat. The figure came to £5 10s. He held this was a burden resting wholly on the landlord. This was clearly right.

2. He took the estimated annual cost of repairing the inside of the flat (excluding decorative repairs) including fair wear and tear but *excluding damage due to negligence*. This figure was given by Mr. Dale at £4 5s. and seems to have been agreed by the parties. The judge held that £1 15s. of it rested on the landlord (presumably for fair wear and tear) and £2 10s. on the tenant (of which 10s. was under his general covenant to repair and £2 under rule 1). I doubt whether the judge was right about this £2. The figure was given by Mr. Dale who said £2 would be spent on washering the taps and regulating the cistern. This looks to me like fair wear and tear and, if so, it should rest on the landlord.

3. He took the estimated annual cost of repairing breakages, such as cracked washhand basins, broken windows, bath panels, and so forth, due to *carelessness*. He had no evidence before him on which to estimate the figure, but he put it at a figure of £7 7s. less the £2 10s., namely, at £4 17s. He held that this was a burden resting wholly on the tenant. I do not think the judge was right about this. He ought to have excluded all damage and breakages due to any act, neglect or default of the tenant or any person claiming under him. Also all damage, such as driving nails into the walls, which was due to any breach of the clauses in the tenancy agreement. Incidentally, I notice that both surveyors said they would not like to estimate damage due to negligence, because it depended so much on the particular tenant. By which I take it there is no average tenant for this purpose. The right way to deal with it is to exclude negligence altogether.

In view of these errors by the county court judge, I think the proper course is to send the case back for the calculation to be

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made afresh. I agree with the views expressed by my noble and learned friend, Lord Keith of Avonholm, and I would allow the appeal accordingly.

Appeal dismissed.

Solicitors: *Stikeman & Co.; Graham Page & Co.*

F. C.

[CHANCERY DIVISION.]

1958 *Nov.* 5.

Wynn-Parry J.

In re ROYCE'S WILL TRUSTS. TILDESLEY *v.* TILDESLEY AND OTHERS

[1956 R. No. 2189.]

Will—Attestation—Trustee—Provisions in will for remuneration of trustee and solicitor — Attesting witness subsequently appointed trustee — Whether entitled to remuneration — Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 15.

Solicitor—Remuneration—Will—Attestation by solicitor—Subsequent appointment as trustee—Whether entitled to remuneration.

A testator by clause 16 of his will provided that "if and so "long as my trustees are retaining any part of the trust fund "[his residuary estate] and receiving and applying the income" they were entitled to pay themselves 5 per cent. of the income thereof "to be equally divided between them by way of remunera- "tion for their services . . . ." By clause 17 he provided that "any person who may for the time being be an executor or a "trustee of my will and who may be a solicitor shall be entitled "to charge and shall be paid out of my estate for his services "in the same manner as though not being an executor or trustee "he had been employed by my executors or trustees to render "such services . . . "

One of the trustees died after the death of the testator and after the will had been proved; the surviving trustee appointed a solicitor who had attested the will to be a trustee in the place of the trustee who had died:—

Held, that an attesting witness was precluded by section 15 of the Wills Act, 1837,[1] from taking any benefit under the will, although he was not in the class entitled to any benefits under the will either when he attested it or when it was proved and only later entered that class; accordingly the solicitor was not entitled to remuneration for his services as trustee under clause 16 or to charge professional remuneration under clause 17.

In re Pooley (1888) 40 Ch.D. 1; 5 T.L.R. 21, and *Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311 considered.

[1] Wills Act, 1837, s. 15: "If "any person shall attest the execu- "tion of any will to whom or to "whose wife or husband any bene- "ficial . . . gift . . . shall be thereby "given or made, such . . . gift . . . "shall, so far only as concerns such "person attesting the execution of "such will, or the wife or husband "of such person . . . be utterly null "and void, and such person so at- "testing shall be admitted as a wit- "ness to prove the execution of such "will . . . notwithstanding such . . . "gift . . ."

ADJOURNED SUMMONS.

By his will dated April 20, 1933, Sir Frederick Henry Royce, Bt., appointed the plaintiff, Mrs. Ethel Tildesley, and one Albert William Claremont as executors and trustees thereof.

By clause 16 he provided: "I declare that if and so long as "my trustees are retaining any part of the trust fund [his "residuary estate] and receiving and applying the income it shall "be lawful for them to pay to themselves out of such income "before dividing the same such a sum as shall equal five per "cent. thereof to be equally divided between them by way of "remuneration for their services . . ." By clause 17 he provided: "I declare that Albert William Claremont or any person "who may for the time being be an executor or a trustee of my "will and who may be a solicitor shall be entitled to charge and "shall be paid out of my estate for his services in the same "manner as though not being an executor or trustee he had been "employed by my executors or trustees to render such services ". . ."

The testator died on April 22, 1933, and his will was proved in the Principal Probate Registry on June 6, 1933, by the plaintiff and Albert William Claremont. The latter died on August 5, 1934, and by a deed of appointment dated July 16, 1934, the plaintiff appointed the first defendant, George Henry Richards Tildesley, a solicitor, to be the other trustee of the testator's will.

By this summons the court was asked by Question 1 thereof to determine whether, having regard to the fact that the defendant George Henry Richards Tildesley was an attesting witness to the testator's will, he had been and was entitled as a trustee of the will: (a) to receive remuneration for his services under clause 16 of the will or (b) to charge professional remuneration as a solicitor against the testator's estate under clause 17 thereof.

H. E. Francis for the plaintiff.

Raymond Walton for the first defendant, Tildesley.

E. I. Goulding for the second defendant, one of the persons contingently interested in a share of residue.

Denys Buckley for the Attorney-General.

Cases cited in argument not referred to in the judgment: *Windham* v. *Chetwynd* [2]; *In re Young* [3]; *In re Ray's Will Trusts*.[4]

WYNN-PARRY J. The first question with which I have to deal is not an easy one and it is one as regards which, curiously enough, there is no direct authority. The question arises because the first defendant was an attesting witness to the testator's will. On the death of one of the two trustees named in that will he was appointed by the surviving trustee to be a trustee of the will. [His Lordship referred to clauses 16 and 17 and continued:]

[2] (1757) 1 Burr. 414.

[3] [1951] 1 Ch. 344; [1951] 1 T.L.R. 262; [1950] 2 All E.R. 1245.

[4] [1936] 1 Ch. 520; 52 T.L.R. 446; [1936] 2 All E.R. 93.

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Having regard to the circumstance that the first defendant attested the will, is he, on becoming a trustee, entitled to receive remuneration under clause 16 and to make professional charges under clause 17 or is the circumstance that he attested the will fatal to his right to receive any benefit under either of those clauses? The question really turns on section 15 of the Wills Act, 1837. [His Lordship read the section and continued:] That section was substituted for the corresponding section, section 1, of the Wills Act, 1752. In that section, however, there was no reference to the husband or wife of an attesting witness, and to that extent the earlier section is extended. The Act of 1752 effected a vital change in the policy of the law because previously the lack of what the Statute of Frauds calls three credible witnesses vitiated the whole will; whereas under what might be called "the new law" dating from 1752 the will is to stand, but the gift is to fail.

The real question which emerges can be put this way: it has been held, and the proposition is beyond dispute, that the provision that a solicitor is to be entitled to the charge, is a legacy. If a person is named in the will as executor and as a solicitor, and the will contains a charging clause, then, of course, at all material times he is a member of a class of persons who have the right to make professional charges. If, however, he only enters that class after the death of the testator, but has attested the will, is he, though entering the class after the death of the testator, within the mischief of section 15? That appears to me to be a difficult question to answer.

In *In re Pooley*,[1] which was a decision of the Court of Appeal, a testatrix appointed two named persons, the second of whom was a solicitor, as executors and trustees of her will and declared that any trustee who should be a solicitor should be entitled to make professional charges. The named solicitor was one of the attesting witnesses and it was held by the Court of Appeal, affirming the decision of Stirling J., that the solicitor was not entitled to any profit costs for business done by him in relation to the estate. The basis of the decision was that the right to make professional charges could only be claimed under the will and was a beneficial interest under it, which the solicitor, as an attesting witness, was precluded from claiming by section 15 of the Wills Act, 1837. That is not exactly this case because there the solicitor in question was named as an executor and trustee in the will, whereas the first defendant here only became a trustee by appointment after the death of the testator. But it is to be observed, as I have stated, that the basis of the decision is that the claim to make professional charges could only have been made under the will.

Mr. Walton relies strongly on *Thorpe* v. *Bestwick*,[2] which lays down the proposition that under section 15 of the Wills Act, 1837, the marriage, after attestation of a will, of a devisee to the

[1] (1888) 40 Ch.D. 1; 5 T.L.R. 21. [2] (1881) 6 Q.B.D. 311.

attesting witness, does not affect the validity of the devise. Mathew J., in a short judgment, said [3]: "I think the plaintiffs are "entitled to judgment. The policy of the Wills Act, 1 Vict. "c. 26, in depriving the attesting witness of any legacy given "by the document of bequest, is not to allow wills to be proved "by the evidence of persons benefited by them, and it makes "void any devise to an attesting witness, or to his or her wife "or husband. In the present case the plaintiff, at the time "when the will was attested, took no benefit under it, but he "subsequently married the devisee, and I am asked to hold that "the result of this marriage is to destroy the validity of the "devise. But there is no such provision in any part of the Act; "the only section which could be referred to is section 24, by "which every will is to take effect as if it had been executed "immediately before the death of the testator."

Mr. Goulding submitted that from this case no general principle but only the very limited one could be deduced, namely that it was only concerned with the point of time when the position of husband or wife was to be ascertained.

Mr. Walton against that drew my attention to the argument of Mr. Firth for the defendant in that case, who is reported as having said [4]: "Section 14 of the Act—enacting that if any "person who shall attest the execution of a will shall, at the "time of the execution or at any time afterwards, be incompetent "to prove the execution, such will shall not on that account be "invalid—contemplates that the witness may become incompe-"tent after the execution of the will and before the death of "the testator. To uphold the present devise would enable an "attesting witness who took a devise under the will to secure "himself by antedating it."

For my own part I take the words of the judgment and extract from them what Mr. Goulding submits, namely that it is directed simply to considering when a person is to be considered as being wife or husband for the purposes of section 15 of the Wills Act, 1837.

My attention was drawn to a passage from the judgment of the Privy Council, delivered by Lord Cohen, in *Commissioner of Stamp Duties of New South Wales* v. *Pearse*.[5] Lord Cohen says [6]: "Their Lordships agree with the majority in the High "Court that the decisions to which Williams J. refers, and in "particular the decisions in *In re Thorley* [7] and *In re Brown*,[8] "lead inevitably to the conclusion that such a provision as "clause 13"—that is the charging clause—"confers a gift on "the executor and enables him to take out of the assets of the "testator something which the law would not otherwise allow."

It is perfectly true that the appointment of the first defendant

[3] (1881) 6 Q.B.D. 311, 312.
[4] Ibid.
[5] [1954] A.C. 91; [1954] 2 W.L.R. 5; [1954] 1 All E.R. 19.
[6] [1954] A.C. 113.
[7] [1891] 2 Ch. 613; 7 T.L.R.
[8] [1918] W.N. 118.

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as a trustee has the result of enabling him to take out of the assets of the testator something which the law would not otherwise allow because there is in the will a charging clause. Against that there is to be borne in mind that it is with the proving of a will that, primarily at any rate, section 15 of the Wills Act, 1837, is concerned. There then remains the short, but still difficult, question of the language of the section. Has one who attests the will—although he is not in the class which has any beneficial interest either when the will is attested or when the will comes to be proved—any right, if he afterwards enters a class defined by the will, to take the benefits which the provisions of the will seek to confer on that class? I find this a difficult question and I can well imagine that different minds might well take different views. I come to the conclusion that the only safe view to adopt is that if a man attests a will he should not in any way be enabled to take any benefit under that will—not even if he only enters a class intended to benefit by the will after the will has been proved.

There is a good deal to be said for the argument put forward by Mr. Walton, but I think that it would necessarily in many cases lead to uncertainty and it might, in certain cases, lead to collusion. For those reasons, therefore, I come to the conclusion that, in answer to Question 1, I should declare that the first defendant is not entitled either to receive remuneration for his services under clause 16, or to charge for professional remuneration under clause 17.

Declaration accordingly.

Solicitors: *Jaques & Co.; Callingham, Griffith & Bate; Treasury Solicitor.*

I. G. R. M.

[PROBATE, ETC., DIVISION.]

1958
July 3, 28;
Oct. 2,
3, 29.

Lord Merriman P.

EWART *v.* EWART.

Husband and Wife—Maintenance—Agreement—Variation by court—Deed for purpose of reconciliation—No jurisdiction to vary—Maintenance Agreements Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 35), *s.* 1 (1).

A husband applied to vary, under the provisions of the Maintenance Agreements Act, 1957, a deed entered into with his wife as a term of her forgiveness of his adultery:—

Held, that since the deed was made for the purposes of resuming cohabitation, and not for the purposes of the spouses living separately, the court had no jurisdiction under the statute to vary it.

ORIGINATING SUMMONS under section 1 of the Maintenance Agreements Act, 1957,[1] adjourned into court for judgment.

[1] Maintenance Agreements Act, 1957, s. 1: "(1) This section applies "to any agreement in writing "made, whether before or after the

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The husband and wife entered into a deed, which was not in form a separation agreement, on May 1, 1954, whereby certain financial arrangements were made between the parties. The husband applied to have these arrangements varied in his favour under the section, alleging certain changes in circumstances; the wife asserted that the deed, which she had agreed as a term of reconciliation, did not come within the Act at all. The following statement of facts leading up to, and subsequent to, the deed, and the summary of the terms of the deed, are taken from the judgment:

The parties were married on August 28, 1931. About the end of November, or early December, 1953, the husband had an illness. When he was lying in bed at the matrimonial home the wife accidentally intercepted a telephone conversation between the husband and a woman with whom, admittedly without the wife's knowledge, he had been committing adultery for some five years, and who had recently had a child of which he was the father, and he was forced to admit this association, which was a very great shock to the wife. She consulted her solicitors, and there was no doubt that she contemplated divorce proceedings. The husband had just obtained new employment,

" commencement of this Act, between " the parties to a marriage for the " purposes of their living separately, " being—(*a*) an agreement containing " financial arrangements, whether " made during the continuance or " after the dissolution or annulment " of the marriage; or (*b*) a separation " agreement which contains no finan- " cial arrangements in a case where " no other agreement in writing be- " tween the same parties contains " such arrangements. . . . (3) Where " an agreement to which this " section applies is for the time " being subsisting and the parties " thereto are for the time being either " both domiciled or both resident in " England, and on an application by " either party the High Court or, " subject to the next following sub- " section, a magistrates' court is " satisfied either—(*a*) that by reason " of a change in the circumstances in " the light of which any financial " arrangements contained in the agree- " ment were made or, as the case " may be, financial arrangements " were omitted therefrom, the agree- " ment should be altered so as to " make different, or, as the case may " be, so as to contain, financial " arrangements; or (*b*) that the agree- " ment does not contain proper finan- " cial arrangements with respect to " any child of the marriage, the court " may by order make such alterations " in the agreement by varying or " revoking any financial arrangements " contained therein or by inserting " therein financial arrangements for " the benefit of one of the parties " to the agreement or of a child of " the marriage as may appear to the " court to be just having regard to " all the circumstances or, as the case " may be, as may appear to the court " to be just in all the circumstances " in order to secure that the agree- " ment contains proper financial " arrangements with respect to any " child of the marriage; and the " agreement shall have effect there- " after as if any alteration made by " the order had been made by agree- " ment between the parties and for " valuable consideration:

" Provided that this subsection shall " not apply to an agreement made " more than six months after the " dissolution or annulment of the " marriage. . . . (6) In this section— " (*a*) the expression 'financial " 'arrangements' means provisions " governing the rights and liabilities " towards one another when living " separately of the parties to a mar- " riage (including a marriage which " has been dissolved or annulled) in " respect of the making or securing " of payments or the disposition or " use of any property, including such " rights and liabilities with respect " to the maintenance or education of " any child, whether or not a child " of the marriage . . . ;"

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which he thought would be jeopardized by the scandal of divorce proceedings, and the court found as a fact that he begged to be forgiven, and was fully cognizant of the outline of the terms on which the reconciliation should be effected. By letter dated December 21, 1953, the husband's solicitors wrote to the wife's solicitors stating that it was unnecessary for them to send the return of the husband's income for the year 1952–1953 because they had heard from him that his wife had agreed to resume married life with him on certain terms which were set out in the letter, the final version of the terms being comprised in the deed itself.

The deed was made between the husband of the first part, the wife of the second part, and two trustees for the wife, who were in fact members of her solicitor's firm. It described both the husband and the wife as being of "Astrope Folly," Puttenham, near Tring in the county of Hertford, a house that had been built for them about 1948, and in which they had lived together until the discovery of the husband's association.

The letter referred to stipulated that the house and the adjacent land should be transferred to the wife, and that the contents should be likewise transferred. The deed recited a conveyance of the freehold land and premises known as "Astrope "Folly" by deed of February 18, 1954, to the wife in fee simple for her own use and benefit absolutely, subject only as therein mentioned. (That reservation referred to an equitable mortgage by deposit of the title deeds for the sum of £3,000 due to the husband and his sister as the trustees of the trust created by their father's will.) The deed also recited that on the same day the husband had delivered to the wife manually the whole of the furniture and effects then in or about "Astrope Folly" aforesaid, to hold the same for her own use and benefit absolutely.

There followed a recital that the husband being desirous of making further amends to the wife, and of providing for her both before and after his death, had agreed to enter into the covenants thereafter contained. Shortly, they were as follows:

(a) To pay all expenses now or thereafter arising in connection with "Astrope Folly," and at his own expense to keep the said property in good and satisfactory repair and condition, and pay all fire insurance premiums and the mortgage interest payable in respect of the said property and the equitable charge thereon:

(b) To execute a proper will, giving the whole of his estate both real and personal whatsoever and wheresoever to the wife for her own use and benefit absolutely, and not to revoke or alter the same during their joint lives.

(In fact a will to this effect had already been executed in 1952.)

(c) On the 1st of every month during their joint lives to pay a sum reasonably sufficient for her support and maintenance,

and for the payment of household expenses of the kind usually paid by the wife out of moneys provided by the husband for such purpose, such sum in any event not to be less than £28 per month:

(d) In addition thereto to pay the trustees during the joint lives of the husband and wife such sum, called "the wife's personal allowance" as after deduction therefrom of income tax, and surtax, if any, will amount to the clear sum of £41 13s. 4d. per month, i.e., £500 a year:

(e) The husband also agreed to pay all the household and other expenses not payable by the wife out of the monthly sum mentioned in clause 1 (c);

(f) To pay all legal costs, charges, fees, etc., incurred by the wife in connexion with her matrimonial affairs including the preparation and completion of the agreement, and documents incidental thereto, and the recited conveyance; and

(g) Finally, he agreed at the request of the wife or the trustees and at his own expense forthwith to execute and do all such instruments, acts and things as the trustees or the wife may respectively require of him for the purpose of fully and effectually carrying out the terms of the agreement.

In consideration of the husband's covenants the wife covenanted:

(a) That so long as he should observe and perform his covenants she would not at any time thereafter take any proceedings against the husband in respect of any misconduct or alleged misconduct committed or alleged to have been committed prior to the date of the deed.

(b) On the same condition as to the husband's performance of his covenants, the wife covenanted to keep the husband indemnified against all debts or liabilities thereafter contracted or incurred by her, and to support and maintain herself, and not to pledge the husband's credit.

(c) Finally, the wife covenanted to pay the household expenses described in clause 1 (c) out of the moneys thereinbefore covenanted to be paid by the husband.

By clause 5 it was mutually agreed that if owing to ill-health, retirement or some other extenuating circumstance which the trustees should consider to be beyond the husband's control, the husband should satisfy the trustees that his means had so materially depreciated that he was unable to continue to pay in full the moneys covenanted to be paid under clause 1 (d), the wife would accept in lieu of the moneys so payable an annual sum which the trustees should decide from time to time as being equal to one third of the husband's total income without deduction except for income tax; or, alternatively, a sum equivalent to the annual income received or due to the husband under his father's will, whichever should be the greater amount. The husband had not produced the figures required by the trustees for this purpose as at the time this summons was heard.

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There was no express provision in the deed for a resumption of cohabitation, but, as the letter of December 21, 1953, showed, the wife had then already agreed to resume married life. The court held upon the evidence that they had actually done so, and accepted the wife's evidence that they went together to spend Christmas, 1953, with her relations at Bournemouth. It was further held that except for a period of about ten weeks in or about April, 1955, when the wife was absent in Canada, they lived together at "Astrope Folly" until August, 1956, when the husband returned to the woman the association with whom had been the cause of the temporary separation.

Joseph Jackson for the husband.
K. Bruce Campbell for the wife.

The hearing of oral evidence, in which the circumstances in which the deed had been entered into were investigated, and argument, was in chambers.

Cur. adv. vult.

LORD MERRIMAN P., reading his judgment, referred to the nature of the summons, and continued: The originating summons was heard in chambers throughout, but as this was said to be the first case under the Maintenance Agreements Act, 1957, and to raise a question of jurisdiction, I have adjourned the giving of my judgment into open court.

The husband puts forward certain alleged changes in the circumstances, in the light of which the original agreement was made. But the wife asserts that the provisions of the deed in question do not come within the Act at all, and it is to this point that the evidence and the arguments have been directed—for, unless the Act of 1957 applies, it is common ground that I have no other jurisdiction, in the circumstances of this case, to reform the terms of this particular deed; and, therefore, there is no object in considering the alleged change of circumstances unless the court is satisfied that the Act applies.

It is now common ground that the agreement is not in form a separation agreement, but it is the husband's contention that its terms are consistent with its being designed to govern a separation, and do so by necessary implication.

The circumstances leading up to the deed may be outlined as follows: [His Lordship referred to those circumstances, and to the terms of the deed, substantially as set out above, and continued:]

The husband, in accordance with his affidavit of June 17, 1958, tried to persuade me in evidence that the background to the deed was what he called "a separation basis," and he pointed to the fact that he had given instructions to his accountants to negotiate with the Inland Revenue authorities on this basis.

I will deal with the oral evidence shortly.

So far as letters are concerned the matter stands as follows: First, there is the statement already referred to in the letter of December 21, 1953, when the husband is reported as having told his own solicitors that the wife had agreed to resume married life with him, and secondly, there is a letter from the husband's solicitors to the wife's solicitors, dated April 21, 1954, in which they acknowledge receipt of the deed of covenant (which it may be convenient now to mention, was originally executed on March 5, 1957, though for some reason in connexion with stamping, it was re-engrossed and executed again on May 1, 1957). The letter continues: "As we have now ascertained that our client's "accountants required the deed for production to the Inland "Revenue authorities on the basis that our respective clients had "separated, and as, of course, the deed was entered into on the "specific understanding that they should resume a normal "married life together, our client will not be entitled to any tax "benefit. We therefore return the deed to you and regret having "troubled you to send it to us."

The husband attempted to repudiate this admission on the ground that he changed his solicitors in or about June or July, 1954. It is true that the husband had then quarrelled with his original solicitors, but his new solicitors writing on January 19, 1956 (the first letter by them to which I have been referred), in dealing with the husband's liability under the deed in respect of certain disputed debts which had been incurred in connexion with the matrimonial home, said that the husband was most unwilling to publish a repudiation of liability "as he will go to almost any "length to preserve the peace with his wife."

The husband also disputed the admission on the ground that the parties were not living a normal married life in the sense that he asserted that he was unable to have sexual intercourse with the wife, and that there was constant friction between them. It is not unlikely that there was sexual coolness on the husband's part after he had transferred his affections elsewhere, or that the domestic atmosphere was inevitably affected by the double life that he was leading. However that may be, I am satisfied that the main source of contention was that the husband was keeping the wife short of money—in fact was spending it on the clandestine association with the other woman.

I prefer the wife's evidence as regards both sexual and money matters, and am satisfied that sexual relations had not ceased before the breach to be described, and continued after the reconciliation.

The husband was an unsatisfactory and unreliable witness. For example, I am satisfied that most of the subsequent friction while they were living together after the reconciliation was brought about because the husband was continually harassing his wife to cancel the deed. In this context I was referred to a letter written to "John," who was the wife's nephew, and admittedly acted on occasions as an intermediary between the husband and wife when

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tension arose. The husband wrote: " I confirm that I will adhere " to all the terms of the agreement. I am perfectly sane in my " mind and I am doing this voluntarily. All harassing will stop. I " love only you. Please come back. I am ashamed of myself." Signed by the husband, with the postscript: " We will (? make) " this a happy home again." Again, his complaint that the wife repudiated the reconciliation by a visit she made to Canada is disposed of by a letter that he wrote to her on April 1, 1955.

But the truth about the genesis of the deed gradually emerged in his oral evidence. In his examination-in-chief after prevaricating about whether the wife had mentioned divorce, and then admitting that she had gone to her solicitors about divorce, he said that he did not want her to divorce him at that time. He was afraid of the scandal as he was just starting a new job; also because, as a strict Presbyterian, he had a great horror of divorce. He said that he never worked out whether, financially speaking, he could comply with the terms or not but instructed his solicitors to accept the terms, and referred to their letter of December 21, 1953. He also said that his wife had told him why she had proposed those particular terms, viz.: because her solicitor had advised her that as he had had this affair with the young woman, which had resulted in the birth of a child, it was very likely at his age that he would do the same thing again, either with the same or another young woman, and might start a young family; that when the deed was being prepared no amendments were proposed on his behalf; that he signed it to get peace and to avoid divorce; and that at the time they were both living at " Astrope " Folly " and continued (as already stated) to do so until August, 1956.

In cross-examination he repeated that he did not want a divorce, that he was primarily concerned with his new employment, so begged the wife to forgive him and start afresh. He agreed that the wife was most anxious that the association should cease, and that he should undertake not to see any more of the woman. He gave this undertaking, and I was referred to a postcard written by him to the woman, telling her that he had done so. Admittedly, he broke his promise soon after the deed was executed. Finally, he repeated the admission that he entered into the deed because he did not want his wife to divorce him, as he then thought she would do, and admitted that financial matters between himself and the wife were conducted in accordance with the deed.

It is really unnecessary to go into more detail as Mr. Jackson admitted at the conclusion of the evidence that on the facts he could not argue that the deed was made for the purposes of separation. He argued, however, that as a matter of law the agreement must be construed as being made for the purposes of the parties to a marriage living separately.

This was put in two ways. First, starting with the premise

that courts are not concerned with the financial arrangements of spouses living together (*Balfour* v. *Balfour* [1]), it was argued that the court should construe the statute as applying only to agreements which were not hitherto against public policy. Therefore, where the court has a choice whether to include or to exclude an agreement hitherto against public policy, then, unless the words of the statute are compelling, the court should construe it so as to include only such agreements as are not void as having hitherto been regarded as against public policy, such as agreements for future separation by spouses living together.

Admitting that a provision contemplating future separation of spouses in a deed executed by them while living apart, with the object and result of bringing them together as man and wife, is not void on the ground of public policy—see *In re Meyrick's Settlement* [2] and *Lurie* v. *Lurie* [3]—the court ought to decline to take cognizance of the agreement so far as it relates to the regulation of financial arrangements between spouses while living together, or, if it recognizes the reconciliation agreement at all, to do so on the basis that it impliedly regulates the financial provision in the event of a second breakdown, and, therefore, is made for the purposes of the parties living separately.

I am not impressed by this argument. I do not think that I am entitled to cut down the plain words of the statute in this artificial manner. In other words, the court in face of the plain words of the statute is not concerned with questions of public policy which are said to have prevailed before it was passed.

Secondly, the argument was put in a somewhat simpler form: namely, that where a husband and wife make a financial agreement which contemplates their living together in a state of reconciliation, the court will always infer, whether it is so expressed or not, that the agreement is intended to operate, even if the reconciliation should not endure. Every reconciliation, it was said, contains the seeds of a breakdown, and therefore an agreement like the present one should be looked at, not as governing only the period of reconciliation, but also as covering the event of the reconciliation not enduring; and it was pointed out that in section 1 (6) (*a*), defining the expression "financial agreements," the words "provisions governing the rights and liabilities towards "one another when living separately" are apt to apply to a separation arising later on the breakdown of the contemplated reconciliation, thus bringing the agreement within the Act, even though it was made while the parties were living together, and says nothing whatever about separation.

Moreover, it was pointed out that the financial provisions themselves being either absolute as in the case of the conveyance of "Astrope Folly," and the will made in the wife's favour, or for the joint lives, as in the case of the monetary provisions, are

[1] [1919] 2 K.B. 571; 35 T.L.R. 609.
[2] [1921] 1 Ch. 311.
[3] 54 T.L.R. 889; [1938] 3 All E.R. 156.

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themselves apt to be applied if a state of separation supervenes.

In my opinion this argument is altogether too wide. What I am really asked to hold is that, because an agreement granting a life interest, and a fortiori one making an out-and-out provision, governs the rights and liabilities towards one another of the parties to it, at least during their joint lives, and because the event of the parties living separately is an event which may occur during their joint lives, any such agreement is one governing the rights and liabilities towards one another when living separately, and is made, therefore, for the purposes of their living separately.

This seems to me to make the duration of the agreed provision rather than the purpose or object with which the agreement is made the test of the applicability of the Act. In other words, it is contended that any eventuality, come what may, which can occur in the joint lives must necessarily be held to be a purpose of the agreement. One would, for example, be obliged to say that a life interest given to a wife by a post-nuptial settlement was a provision governing their rights and liabilities when living separately. Mr. Jackson did not shrink from accepting this illustration of his contention, and it is probably unprofitable to search for other examples.

In my opinion this interpretation makes nonsense of the terms of the Act.

I find as a fact, and so hold, that the deed was made for the purposes of resuming cohabitation, and not otherwise, and that it was not made for the purposes of the spouses living separately. It was, in fact, intended, if possible, to prevent a repetition of the separation.

In my judgment the originating summons fails for lack of jurisdiction and must be dismissed.

Solicitors: *M. A. Jacobs & Sons; Cardew-Smith & Ross.*

J. B. G.

[CENTRAL CRIMINAL COURT.]

C. C. C.

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Sept. 22.

Salmon J.

REGINA *v.* MACKINNON AND OTHERS.

Criminal Law—Fraud—Investments—"Reckless making of . . . forecasts"—Whether "recklessness" in statutory context connotes dishonesty—Prevention of Fraud (Investments) Act, 1939 (2 & 3 *Geo.* 6, *c.* 16), *s.* 12 (1).

M. was charged, jointly with others, with offences involving the reckless making of statements and forecasts which were misleading, false or deceptive to induce persons to buy shares, contrary to section 12 (1) of the Prevention of Fraud (Investments) Act, 1939. On a submission that the word "reckless" in the section imputed

an element of dishonesty, and that, accordingly, the defendant could not be convicted unless it were shown that he had not honestly believed the truth of the statements and forecasts to which he had been a party:—

Held, that the court, in deciding the intended meaning of words in a statute, would not construe them as creating a criminal offence unless they did so in the clearest language; that the purpose of the Prevention of Fraud (Investments) Act, 1939, as proclaimed by its title, indicated that it was not intended to include in its provisions offences which had nothing to do with fraud; accordingly, the word "reckless" meant "not caring whether the statement was true or "false."

Derry v. *Peek* (1889) 14 App.Cas. 337; 5 T.L.R. 625 applied.

Rex v. *Bates and Russell* [1952] W.N. 506; 36 Cr.App.R. 175; [1952] 2 All E.R. 842 not followed.

TRIAL ON INDICTMENT.

Frank Hay Livingstone Mackinnon was charged, jointly with others, on an indictment containing, inter alia, four counts which alleged that the accused had induced certain persons to enter into agreements for acquiring shares by the reckless making of statements and forecasts which were misleading, false or deceptive, contrary to section 12 (1) of the Prevention of Fraud (Investments) Act, 1939.[1] At the close of the case for the prosecution, counsel for Mackinnon submitted that the word "reckless" in the section involved, not only a high degree of negligence, but also an element of dishonesty or fraud, and that the jury should be so directed. The case is reported solely upon this point.

Maxwell Turner and *Mervyn Griffith-Jones* for the Crown.

H. J. Phillimore Q.C. and *David Lloyd* for the defendant Mackinnon.

Peter Rawlinson for the defendant Limpkin.

Neville Faulks and *David Hurst* for the defendant Barnett.

R. E. Seaton for the defendant Cole.

F. H. Lawton Q.C. and *William Howard* for the defendant Whitehead.

Sebag Shaw for the defendants Whitehead Industrial Trust Limited.

H. J. Phillimore Q.C. and *David Lloyd* for the defendant Mackinnon. "Recklessness" in this context must amount to fraud. A statute which creates a criminal offence must be construed in favour of the subject: Maxwell on Interpretation of Statutes, 9th ed., pp. 268, 288. This statute must be construed

[1] Prevention of Fraud (Investments) Act, 1939, s. 12: "(1) Any "person who, by any statement, "promise or forecast which he knows "to be misleading, false or deceptive, "or by any dishonest concealment of "material facts, or by the reckless "making of any statement, promise "or forecast which is misleading, "false or deceptive, induces or "attempts to induce another person— "(*a*) to enter into or offer to enter "into—(i) any agreement for, or with "a view to, acquiring . . . securities ". . . shall be guilty of an offence, "and liable to penal servitude for a "term not exceeding seven years."

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in accordance with its object as stated by Parliament, namely, the prevention of fraud. In construing the word "reckless" in this statute, one must also have regard to the existing law and apply a meaning consistent with it. Since *Derry* v. *Peek*,[2] recklessness in matters of fraud has always been coupled with the definition "not caring whether the statement was true or false." *Rex* v. *Bates*[3] was wrongly decided.

Maxwell Turner and *Mervyn Griffith-Jones* for the Crown. The object of a statute is only relevant to its construction where there is ambiguity in its wording. Here there is none. The section here being considered creates three offences, (i) knowingly making a misleading or false statement or forecast, (ii) dishonestly concealing material facts, and (iii) recklessly making a misleading or false statement or forecast. The difference between the first and third offences is that whereas the first must be dishonest, the third need not be so. The word "reckless" is not qualified and must be given its full and unrestricted meaning, namely, "careless," "heedless," "inattentive to duty": *Rex* v. *Bates*,[3] *Rex* v. *Hindes and Musgrove*.[4] Although the point was not argued in *Reg.* v. *Russell*,[5] the Court of Criminal Appeal did not dissent from the decision of Donovan J. in *Rex* v. *Bates*.[3] In *Derry* v. *Peek*,[6] Lord Herschell forecast that negligence of this type might become the subject of legislation.

SALMON J. referred to the provisions of section 12 (1) of the Prevention of Fraud (Investments) Act, 1939, and continued: It is contended on behalf of the Crown that the word "reckless" in that section means no more than "very careless" and that, accordingly, anyone who very carelessly makes a false statement, promise or forecast and thereby induces or attempts to induce another to enter into any agreement for acquiring securities commits a criminal offence. According to the Crown's argument, providing the accused person is proved to have been very careless, he is guilty of this criminal offence, carrying with it a maximum sentence of seven years' imprisonment, even if he honestly believed in the truth of what he wrote or said.

It is contended on behalf of the defence that the word "reckless" means "not caring whether the statement, promise "or forecast be true or false," and that if an accused person honestly believed in the truth of what he had said or written he cannot be guilty of an offence under this section. *Rex* v. *Bates and Russell*,[1] a decision of Donovon J., is clearly in favour of the Crown's contention, and is supported by an obiter dictum of the Court of Criminal Appeal.[2] *Rex* v. *Bates and Russell* is a highly persuasive authority, but it is not binding on me.

[2] (1889) 14 App.Cas. 337; 5 T.L.R. 625.
[3] [1952] W.N. 506; 36 Cr.App.R. 175; [1952] 2 All E.R. 842.
[4] (1951) unreported.
[5] [1953] 1 W.L.R. 77.
[6] (1889) 14 App.Cas. 337, 376.
[1] [1952] W.N. 506; 36 Cr.App.R. 175; [1952] 2 All E.R. 842.
[2] *Reg.* v. *Russell* [1953] 1 W.L.R. 77.

It is unnecessary for me to say with what profound respect I regard any judgment of Donovan J. or any observations of the Court of Criminal Appeal. I have, however, the great misfortune to differ from Donovan J. upon the true construction of this statute. I do so with misgiving and diffidence, but as I have reached a clear conclusion on the matter I must give effect to it.

It is conceded that the word "reckless" is capable of either of two rival meanings for which the Crown and the defence respectively contend. When a word is used in a statute which may bear one of two meanings, I know of no canon of construction that compels the court to adopt the wider of the two meanings merely because it is the wider. The court must look at the word in its context in the statute, and decide which meaning Parliament intended it to bear. Moreover, the courts are slow to construe a statute as creating a criminal offence unless the statute does so in the plainest terms.

Ever since *Derry* v. *Peek*[3] the word "reckless," used in relation to false statements, strongly suggests a statement made not caring whether it be true or false; that is, a dishonest or fraudulent statement as distinct from one which is made with an honest belief in its truth.

I am here construing a statute the very name of which is the Prevention of Fraud (Investments) Act, 1939. Its purpose, as it proclaims, is to make general provision for preventing fraud in connexion with investments. Section 12 (1) deals with false statements, promises and forecasts. The cross-heading which immediately precedes this section reads: "General "provisions for the prevention of fraud." It seems to me, therefore, that it would be wrong to approach this section on the basis that unless its language compels me to a contrary view, "reckless" must bear the wide meaning contended for by the Crown rather than the meaning attributed to it in *Derry* v. *Peek*.[3]

It would be surprising if Parliament, in a section creating a number of offences whose very essence is fraud, had included an offence which has nothing to do with fraud. It is to me almost incredible that if that had been Parliament's intention it would have carried it out by the use of the word "reckless," a word which, used in relation to false statements, had by 1939 for about forty years generally been understood to indicate fraud. When Parliament intends, as in the case of a prospectus, that the careless making of an untrue statement shall constitute a criminal offence, irrespective of fraud, it does so in the clearest language: see the Companies Act, 1948, s. 44. I can find no such clear language in the section I am considering.

The Crown relies, particularly, on the following passage in the judgment of Donovan J.[4]: "If one analyses section 12 (1),

[3] (1889) 14 App.Cas. 337; 5 T.L.R. 625.

[4] 36 Cr.App.R. 175, 181.

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"it is found to deal with three categories of persons who have "induced or attempted to induce other persons to invest money. "The first is the person who makes a statement which he knows "to be misleading, false or deceptive; the second is the person "who dishonestly conceals material facts; and the third is the "person who recklessly makes a statement, promise, or forecast "which is misleading, false, or deceptive. Categories 1 and 2 "obviously refer to persons who are dishonest, but, after referring "to a person who has knowingly made a false statement or has "dishonestly concealed material facts, the legislature, introducing "its third category by the disjunctive 'or,' changes its language "altogether. It does not specify a person who knowingly makes "a misleading, false, or deceptive statement, promise, or fore-"cast, or dishonestly makes it. It simply specifies a person who "recklessly makes these things."

I agree that section 12 appears to deal with three categories of persons. To my mind, however, they all three have the common characteristic of dishonesty. There is very little, if any, difference between categories one and two. It would appear that category two is included only ex abundanti cautela to cover the sort of facts that existed in *Rex* v. *Kylsant*.[5] If any fact that is omitted from a statement, promise or forecast is material, it can only be material in that its omission makes what has been said misleading, false or deceptive. If the omission is dishonest, it can only be dishonest because the person who makes it knows that what he has said is misleading, false or deceptive by reason of that omission. I am inclined to think that category two is already covered by category one.

It is true that the third category is introduced by the disjunctive "or," and involves a change of language which does not include the word "dishonesty." This point, however, does not greatly impress me. The word "dishonest," which is used in the second category, is not used in the first category; and the second category is also introduced by the disjunctive "or." No one suggests that this is any reason for supposing that the first category does not involve dishonesty.

In my judgment the legislature intended this section to cover all fraudulent statements, promises and forecasts, made for the purposes specified in the section. It might, of course, have read simply: "Any person who dishonestly makes any statement, "promise or forecast which is misleading, false or deceptive "..." The legislature, however, recites (as is the usual practice in pleadings in civil actions) the well-known elements constituting dishonesty. To make quite certain that it covers the *Rex* v. *Kylsant*[5] type of case, it introduces the words "dis-"honest concealment of material facts." It is for this purpose essential to use the word "dishonest," because an innocent concealment would be outside the scope of this section.

[5] [1932] 1 K.B. 442; 48 T.L.R. 62; 23 Cr.App.R. 83, C.C.A.

It has also been argued that as the section refers, not only to statements and promises, but also to forecasts, the section must be intended to cover careless though honest forecasts because of the difficulty in proving the absence of an honest belief in a forecast. I do not think it is permissible to construe a statute as creating a criminal offence because of the difficulties of proof which might be involved in a contrary construction. In any event, once it is proved that the forecast is misleading, false or deceptive, and that there were no reasonable grounds for believing it, there exists powerful evidence that the accused who made the forecast for some purpose of his own either must have known it was untrue or had no real belief in its truth. Often in the case of alleged fraudulent statements the only evidence of dishonesty consists of evidence that no grounds exist on which any reasonable man could have believed in the truth of the statements. In my experience, juries are not slow in a proper case to draw the inference of fraud.

For those reasons I am unable to hold that this section, which makes general provisions for the prevention of fraud, has by a sidewind created an offence entirely independent of fraud. I shall, therefore, direct the jury that the word "reckless" in this section has the same meaning as that attributed to it in *Derry* v. *Peek*.[6]

Solicitors: *Director of Public Prosecutions; Isadore Goldman & Son; B. A. Perkoff; P. R. Kimber; Sole, Sawbridge & Co.; Claude Hornby & Cox.*

J. D. P.

[6] 14 App.Cas. 337.

[CHANCERY DIVISION.]

In re SIMPKIN MARSHALL LTD.

[No. 00304 of 1955.]

1958
July 31,
Oct. 30.

Wynn-Parry J.

Company — Winding up — Costs — Compulsory winding up — Solicitors' work in contemplation of proposed legal proceedings—No proceedings taken—Whether work "contentious" or "non-contentious"—Solicitors (Amendment) Act, 1956 (4 & 5 *Eliz.* 2, *c.* 41), *s.* 13 (4) (*a*), *replaced by Solicitors Act,* 1957 (5 & 6 *Eliz.* 2, *c.* 27), *s.* 86.

Solicitor—Costs—Lump sum or gross charge—Whether business "contentious" or "non-contentious"—Compulsory winding up—Work done in contemplation of legal procedings—No proceedings taken.

In the course of the compulsory winding up of a company solicitors were required by the liquidator to prepare cases for counsel to

[Reported by MISS MARGARET THOMAS, Barrister-at-Law.]

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advise as to (a) whether certain misfeasance proceedings should be taken, and (b) as to the recoverability of certain debts owing to the company. In the result no such proceedings were taken.

The taxing master decided that the business was non-contentious. On the hearing of a summons taken out by the liquidator to review the taxation:—

Held, (1) that since the coming into force of section 13 (4) (*a*) of the Solicitors (Amendment) Act, 1956 (now replaced by section 86 of the Solicitors Act, 1957 [1]) not only all business done in the course of proceedings was to be regarded as contentious, but also all business which was done before proceedings were begun, provided that the business was done with a view to the proceedings being begun, and they were in fact begun; all other business was non-contentious.

(2) That when advice was sought in the course of a compulsory winding up for the purpose of deciding whether or not to begin legal proceedings, such advice was referable to the contemplated proceedings. If, therefore, legal proceedings were begun, such advice must be treated as contentious business, but if the legal proceedings were not begun, then the advice must be treated as having been obtained in the course of the winding up, and, accordingly, as non-contentious, whether the contemplated proceedings were to be by an independent writ or by summons in the winding up.

SUMMONS to review taxation.

[The following summary of the facts is taken substantially from his Lordship's judgment.] This was a summons by the official receiver as liquidator of Simpkin Marshall Ltd. (hereinafter called "the company") which was in course of compulsory liquidation, for the review of a taxation of costs for work done by the respondents, Messrs. Stafford Clark & Co., as solicitors for the company acting on the instructions of the applicant in the course of the winding up.

The work involved the perusal of a number of documents, and the collating of the facts, followed by the preparation of two cases to counsel in order to obtain advice as to (a) whether or not any officer of the company had committed a breach of trust in relation to the company's affairs on which proceedings for misfeasance could be founded, and (b) as to the recoverability of the unexpended balance of deposits paid by the company to certain other companies. In the event no proceedings were taken under either of the above heads. In those circumstances the respondents, treating the business as non-contentious business, delivered a lump sum bill. The taxing master accepted the view that the business was non-contentious, and taxed the bill under Schedule II of the Solicitors' Remuneration Order, 1883 (as amended by the Solicitors' Remuneration Order, 1953), article 2 (*c*) of which

[1] Solicitors Act, 1957, s. 86: "'Contentious business' means business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator appointed under the Arbitration Act, 1950, not being business which falls within the definition of non-contentious or common form probate business contained in subsection (1) of section 175 of the Supreme Court of Judicature (Consolidation) Act, 1925. . . . 'non-contentious business' means any business done as a solicitor which is not contentious business as defined by this section."

provides that solicitors' remuneration is to be regulated by Schedule II where the work done relates to certain specified conveyancing matters "and in respect of other business not being "business in any action."

The applicant brought in objections to the basis of the taxation, contending that the business was contentious business, and, therefore, that under Order 65, rule 8 of the Rules of the Supreme Court, the costs were chargeable under Appendix N. The taxing master overruled the objections, and the official receiver sought a review of the taxation.

Denys Buckley for the official receiver as liquidator.
E. Milner Holland Q.C. and *L. H. L. Cohen* for the solicitors.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

October 30. WYNN-PARRY J., reading his judgment, stated the facts and continued: The first ground put forward on behalf of the applicant can, I think, be quickly disposed of. He contends that the winding-up proceedings are an action within the meaning of that word in section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that: "'Action' "means a civil proceeding commenced by writ or in such other "manner as may be prescribed by rules of court, but does not "include a criminal proceeding by the Crown." A petition for the compulsory winding up of a company does not fall within this definition because in the first place a petition is not a writ of summons, and in the second place the form of proceeding is prescribed in the relevant statute, the Companies Act, 1948, section 224, and not in either the Rules of the Supreme Court or the Companies (Winding-up) Rules, 1949.

The main point, however, which was argued, was whether or not the business in question was contentious business. For the solution of this question one must first turn to section 86 of the Solicitors Act, 1957, replacing section 13 (4) (*a*) of the Solicitors (Amendment) Act, 1956. [His Lordship read the section and continued:] On this definition of contentious business it was contended on behalf of the applicant that, irrespective of the question whether or not the proceedings begun by petition for the compulsory winding up of the company are within the definition of action in section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, they are proceedings begun before a court. I accept this submission. Then comes the critical question: Was the business done "in or for the purpose of those proceedings"? The main contention of the applicant is built up in this way. First it is said, the effect of the court making a winding-up order is to continue the proceedings begun by the petition until the final dissolution of the company. I accept this step. From this it is

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argued that all business done by a solicitor in the course of the winding up is done in or for the purposes of those proceedings: ergo such business is contentious business as defined in section 86 of the Solicitors Act, 1957.

In the ordinary course, business consisting of advising whether or not proceedings should be started is non-contentious business, and only becomes contentious business if proceedings are in fact started: hence the necessity in defining contentious business to include not only the preposition " in " but also the words " for the " purpose of." It will thus be seen that in the ordinary case the test of whether the business of advising on the question of bringing proceedings is to be regarded as contentious business depends on the course taken subsequently to the advice being given. It must follow from the argument of the applicant that, supposing the business done is advising whether or not a writ of summons should be issued, the nature of that business is not to be tested by posing the question, were the proceedings in fact begun as a result of the advice? The question is answered as soon indeed as the business of advising is undertaken, because it is done " in " existing proceedings.

The matter does not rest there. Carried to its logical conclusion the argument of the applicant must cover every type of business done by a solicitor in a compulsory liquidation, including such essentially non-contentious work as conveyancing. In his objections the applicant said this: " It is understood that the " practice has always been to tax the costs of solicitors employed " by the liquidator in a compulsory winding up in accordance with " Order 65, rule 8, which provides that in ' causes and matters " ' . . . solicitors shall be entitled to charge and be allowed the " ' fees set forth . . . in Appendix N.' Only the costs of con- " veyancing business have been taxed under the General Order " (in accordance with Order 65, rule 27, regulation 30). This " practice is supported by the decision in *Stanford* v. *Roberts*." [1]

Prima facie it might be argued that Order 65 was intended to deal only with contentious business, and that regulation 30 of Order 65, rule 27 was in the nature of a mopping-up provision and did not include work and labour of a non-contentious nature. But, as appears from the passage from the objections which I have quoted, reliance is placed on the decision of Kay J. in *Stanford* v. *Roberts*.[2] In that case Kay J. had to consider the effect of section 2 of the Solicitors' Remuneration Act, 1881, and the General Order of 1882 made thereunder. Section 2 gave authority to the Lord Chancellor and the other persons named to make a general order " for prescribing and regulating the remuneration " of solicitors in respect of business connected with sales, " purchases, leases, mortgages, settlements and other matters of " conveyancing, and in respect of other business not being busi- " ness in any action." The General Order made in August,

[1] (1884) 26 Ch.D. 155. [2] Ibid.

1882, contained in rule 2 the above language from section 2: and it will be observed that so does rule 2 of the Solicitors' Remuneration Order, 1883. Kay J. decided that the words "not being "business in any action" qualified only the immediate antecedent "in respect of other business," and therefore section 2 and the General Order of 1882 covered conveyancing matters in an action as well as conveyancing matters out of court. His decision was approved by the Court of Appeal in *In re Merchant Taylors' Co.*[3]

As the language of rule 2 of the Solicitors' Remuneration Order, 1883, is similar to that of the General Order of 1882, no doubt the reasoning of the judgment in *Stanford* v. *Roberts*[4] applies to the former.

It is to be observed that Kay J. was not concerned to decide whether conveyancing matters in an action were to be regarded as contentious matters or non-contentious matters. All he had to decide was the short question of construction under section 2 of the Solicitors' Remuneration Act, 1881, whether the conveyancing matters mentioned in that section included conveyancing matters in an action.

Section 81 (1) of the Solicitors Act, 1932, defined contentious business as including "any business done by a solicitor in any "court, whether as a solicitor or as an advocate." This is a narrow definition and would appear to recognize that conveyancing business done in or for the purposes of an action was not to be regarded as contentious business. It would thus support the practice to which I have referred. In 1957, however, the Solicitors Act was passed and came into force on July 15, 1957, applying to all bills delivered on or after that date. It therefore applies to this bill which was delivered on November 21, 1957. I have read the definition of contentious business contained in section 86 of that Act. This definition is very much wider in scope than the definition in the Act of 1932, and in my view, assuming that prior to November 1, 1956, conveyancing business done in an action was non-contentious business, the position was changed on that date by the coming into force of the Solicitors (Amendment) Act, 1956. It appears to me that the definition of contentious business in that Act and the Solicitors Act, 1957, must include conveyancing business done in an action. The scope of the Solicitors' Remuneration Order, 1883, must therefore be treated for the future as not extending to conveyancing business done in an action, the phrase "in or for the purposes of proceed-"ings begun before a court" clearly including conveyancing business done in an action. This result, assuming it to be correct, as I hold that it is, may be said to have been achieved in an odd way, but there is this advantage, that there is now a clear and, I should have thought, logical division between contentious and non-contentious business. All business is now to be regarded as contentious which is done before proceedings are begun provided

[3] (1885) 30 Ch.D. 28.

[4] (1884) 26 Ch.D. 155.

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that the business is done with a view to the proceedings being begun, and they are in fact begun, and also all business done in the course of the proceedings. All other business is non-contentious.

The relevance of the foregoing analysis is that it shows that for the applicant to succeed he must show that every piece of business, of whatever nature, which is done by a solicitor in the compulsory liquidation of a company on the instructions of the liquidator is contentious business. Now the result of accepting the validity of this proposition would be to point a very sharp distinction between business done by a solicitor in a compulsory winding up and business done by a solicitor in a voluntary winding up. In the case of a voluntary winding up there is no ground for saying that business consisting of advising the liquidator as to whether or not proceedings should be begun is anything but non-contentious business, unless the proceedings are in fact begun. But if the applicant's contention is correct then the mere existence of the proceedings leading up to the order for compulsory winding up makes all business done by a solicitor during the course of the winding up contentious business.

I have found the question which is raised by this summons to be a really difficult one. Two minds could with much show of reasoning take opposite views. Further, as I shall show later, the whole question can easily be resolved for the future by administrative action. However, it is my duty to pronounce on the question before me and I shall proceed to do so.

As I have said earlier in this judgment, the result of presenting a petition for the compulsory winding up of a company is that proceedings have been begun before a court. The relief asked by the petition is that the company should be wound up by the court. Upon the making of the order the proceedings thus begun are not exhausted: they continue until the company is finally dissolved. This is necessary in order to continue the jurisdiction conferred on the court by the making of the order for winding up. Throughout the period of winding up the affairs of the company the jurisdiction of the court to control the winding up continues, and it continues by virtue of the legal proceedings begun by the presentation of the petition and the order to wind up. As a result of the making of the order there are brought into operation all the provisions of the Companies Act, 1948, relating to a compulsory winding up.

Section 237 of that Act provides: "For the purpose of con-"ducting the proceedings in winding up a company and perform-"ing such duties in reference thereto as the court may impose, "the court may appoint a liquidator or liquidators." In that section the word "proceedings" has a wider import than the phrase "legal proceedings." It includes all the steps which must be taken by the liquidator in order to achieve the object of the order of the court, viz. the winding up of the affairs of the company, leading to its eventual dissolution. By section 245 (1) of

the Act it is provided that "The liquidator in a winding up by the "court shall have power, with the sanction either of the court or "of the committee of inspection (*a*) to bring or defend any action "or other legal proceeding in the name and on behalf of the "company" and "(*c*) to appoint a solicitor to assist him in the "performance of his duties."

Let me consider first a case in which with the sanction of the committee of inspection the liquidator takes legal proceedings, which are begun by writ of summons. Put aside for the moment any advice which may have been given by the solicitor to the liquidator prior to the issue of the writ. Then let the question be asked: Is the business which the solicitor conducts in the action in or for the purposes of that action or is it in or for the purposes of the legal proceedings begun by the petition for the winding up of the company? To my mind the answer must be that the business is done in or for the purposes of the action. Then the question must be asked: Assuming the liquidator obtained advice prior to the issue of the writ, was that advice obtained in or for the purposes of the legal proceedings begun by the petition or for the purposes of the action postulated? To my mind the answer is that he obtained the advice for the purposes of the action. The advice is not referable to the relief claimed in the petition. It was obtained for the purposes of the proceedings in the winding up, using the word in the sense in which it is used in section 237 of the Companies Act, 1948. The advice was obtained for the purpose of deciding whether or not to begin substantive legal proceedings and is therefore referable to those legal proceedings. If, therefore, legal proceedings are begun, the business involved in giving or procuring the advice must be treated as contentious business: but if legal proceedings are not begun, then the advice must be treated as having been obtained in the course of the proceedings (using the word in its wide sense) in winding up, and must therefore be treated as non-contentious business.

The question then arises: Is there any difference between legal proceedings begun in the course of a compulsory winding up by writ and such proceedings begun by summons entitled with the same heading as that in the petition for an order for the compulsory winding up? Proceedings of this nature fulfil the conditions of section 245 (1) (*a*) of the Companies Act, 1948, because they are taken in the name and on behalf of the company. They are begun when and only when the necessary summons is issued. They are brought in order to obtain the substantive relief claimed, and that relief is claimed for the purposes of the winding up and not for the purposes of the proceedings in which the winding up order was obtained.

The words of the definition of contentious business, however, are "in or for the purposes of proceedings begun before a court." The disjunctive "or" is used and so the question must be answered, What is the effect of taking out a summons in the

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winding up which by the rules of procedure is entitled in the legal proceedings which led to the making of the order for winding up, which proceedings continue in being until the final dissolution of the company concerned? In my view the answer must be that if any such summons is taken out it must be regarded as taken out in those proceedings even though it asks for substantive relief. That, however, does not conclude the matter. If I am right in my conclusion that in the case where proceedings have to be begun by writ, the business of advising is referable to the proceedings, if begun, for the purpose of deciding in what proceedings that business is to be regarded as contentious business, then I can find no good ground for not applying the same reasoning to the case of advice given leading to the issue of a summons entitled in the proceedings begun by the petition. In my view the business of giving such advice only becomes contentious business in such proceedings by virtue of the issue of such summons. It follows that if no such summons is issued the business of advising remains non-contentious business.

If the contrary view were to prevail, the result would be both inconvenient and odd. It would mean that the method of taxing the costs of obtaining the advice under head (*a*), that is, whether misfeasance proceedings should be begun would be taxed under Appendix N, while the costs of obtaining advice under head (*b*), where proceedings if taken would have to be begun by writ, would be taxed under the Solicitors' Remuneration Order, 1883.

I have not failed to take note of the fact that Appendix N contains items which are applicable only where a company is being wound up compulsorily. It was argued that the presence of those items in Appendix N was a pointer to the conclusion that all charges by a solicitor for work done in a compulsory winding up should be taxed under Appendix N. The argument is attractive, but I do not find it conclusive. It can be said with equal force that the items should not have been included in Appendix N at all.

A further argument addressed to me was based on rule 192 of the Companies (Winding-up) Rules, which provides that in a county court all costs properly incurred in a winding up by the court are chargeable on the lower scale in Appendix N. It was then said that the intention of the legislature must have been to place the taxation of costs in the county court and the taxation of costs in the High Court on the same basis. If that had been the intention it would have been easy to say so: but the introduction of rule 192 does not lead to the conclusion, as a necessary conclusion, that the intention of the legislature was as is suggested.

It can be argued with much force that by referring only to proceedings in a county court, the legislature intended that costs in the High Court should be dealt with on a different basis.

As I have already said, I have found the whole matter one of great difficulty, and I recognize that a different view could well be entertained. Only one thing is certain and that is that the

position is far from clear. Whether or not all costs properly incurred in a winding up by the High Court should be taxed under Appendix N is a matter of policy, on which it is not for me to pronounce. I would, however, point out that if it were to be decided that that policy should be followed, it can be achieved by a short amendment to the Companies (Winding-up) Rules, 1949.

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Summons dismissed.

Solicitors: *Solicitor to the Board of Trade; Stafford Clark & Co.*

[CHANCERY DIVISION.]

In re SHIPWRECKED FISHERMEN AND MARINERS' ROYAL BENEVOLENT SOCIETY.

1958 *Oct.* 31.

Danckwerts J.

[1958 S. No. 587.]

Charity—Investments—Statutory charity—Powers of investment regulated by special Act of 1850*—Application for wider powers of investment—Whether permissible—Trustee Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 57.

The applicant society was incorporated by an Act of Parliament of 1850. The investments of the general funds of the society were regulated by section 11 of that Act which provided that the society's moneys might be invested in (a) the mortgages of lands in fee simple or held on lease for a term of which at least 60 years remained unexpired, (b) stock of the public funds of the United Kingdom, and (c) Exchequer Bills, South Sea Stock and Bank Stock. Over the years there had been a steady fall in the value of the society's investments which were all of a kind authorized by law for the investment of trust funds, and a decline in value of fixed income and other trustee investments. On an application for an order that the society's powers of investment be increased by way of scheme in terms set forth in draft minutes of order annexed to the summons:—

Held, (1) that to allow a wider power of investment was to confer additional powers of investment and was not, therefore, inconsistent with but was in aid of and supplemental to the powers of investment conferred by section 11 of the Act of 1850.

(2) That the Trustee Act, 1925, and in particular section 57 [1]

[1] Trustee Act, 1925, s. 57 (1): "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particuar instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income."

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thereof, had modified the provisions of the Act of 1850 so that the court could, under section 57, authorize the investment by the society in a particular fund and also confer upon trustees a general power of investment; and that it was desirable in the present case to give a general power to invest in the terms of the proposed scheme.

Adjourned summons.

The Shipwrecked Fishermen and Mariners' Royal Benevolent Society applied by originating summons for an order to be made by way of scheme in terms set forth in draft Minutes of Order annexed to the summons. The draft Minutes of Order were as follows:

"I. The following investments and moneys, viz., (a) the "investments and moneys representing the capital of the general "funds of the corporation and (b) the investments and moneys "representing the capital of the several trusts (hereinafter called "the special trusts) mentioned in the schedule to the scheme "of which the society is the trustee shall be consolidated into "one combined pool. All the said investments and moneys as "the same may from time to time be constituted or represented "are hereinafter referred to as 'the pool.'

"II. The general funds of the society and each of the special "trusts shall be regarded and treated for all purposes as "interested from time to time in an appropriate undivided "aliquot portion of the pool.

"III. For the purposes of settling, adjusting and regulating "the respective amounts for the time being of the aliquot por-"tions of the general funds of the society and each of the "special trusts all valuations and calculations shall be made "and from time to time revised as circumstances may require "by the society.

"IV. Subject to the provisions hereinafter contained moneys in "or arising from the pool and requiring investment may be in-"vested in or upon any of the following investments and such "investments may be varied for others of a like nature:

"(1) Investments which at the date of investment are "authorized by law for the investment of trust moneys but with-"out any of the restrictions imposed by section 2 of the Trustee "Act, 1925.

"(2) Freehold land in Great Britain or leasehold land in "Great Britain held for a term of which at least 60 years are "unexpired at the date of purchase and as to both freehold and "leasehold land whether or not subject to easement or restric-"tive covenants: Provided that no investment shall be made "under this paragraph of this clause at any time when or of "such amount that the value for the time being of all the invest-"ments authorized by this paragraph held by the society as "part of the pool then exceeds or would exceed one sixth of the "value for the time being of the whole pool.

" (3) (a) Securities of or guaranteed by the government of the " U.S.A. or any state thereof.

" (b) The stocks, bonds, debentures or securities of any " municipality, county or district council, public body, local " authority, public utility company or railway situate or operating " within the British Empire and Commonwealth of Nations or " the U.S.A.

" (c) The debenture stock or guaranteed preference, ordinary " or deferred stock or shares, or other marketable securities of " any company having its registered . . . office in any part of the " British Empire or Commonwealth of Nations or the U.S.A. " Provided as follows:

" (i) No moneys shall be invested upon any investment " mentioned in this paragraph of this clause which is not dealt " in or quoted officially on one of the recognised Stock Exchanges " in London, New York, Montreal or Toronto . . .

" (ii) No moneys shall be invested in any stock or shares of " any company (other than a company incorporated in the U.K. " carrying on banking or insurance business) which . . . carry " a liability to contribute by way of calls either in the event " of the company being wound up or otherwise.

" (iii) No moneys shall be invested in the ordinary or " deferred shares of any company unless such company at the " time of the investment has . . . a paid up capital of at least " £750,000 or its equivalent at the current rate of exchange . . .

" V. No moneys shall be invested in any investment men- " tioned in either paragraph (2) or (3) of clause IV at any time " when or of such amount that the value for the time being of " all the investments authorized by either paragraph (2) or (3) " held by the society as part of the pool then exceeds . . . two- " thirds of the value for the time being of the whole pool."

The society was instituted in 1839 and was incorporated in 1850 by the Shipwrecked Fishermen and Mariners' Royal Benevolent Society Act, 1850. The principal objects of the society were to grant immediate relief to seamen of all classes suffering shipwreck, or to their widows and families in case of death, and relief and assistance to members of the society and their families. The income of the society was derived from three main sources, namely, voluntary contributions and legacies, membership payments and dividends and interest on invested funds. The investments of the general funds of the society were regulated by section 11 of the Act of 1850 which provided: " That any " of the monies for the time being belonging to the said corpora- " tion, may be from time to time invested either in the name of " the said corporation or in the names of the trustees for the " said corporation; on mortgages of any manors, messuages, " lands, tenements or hereditaments of a clear and indefeasible " estate of inheritance in fee simple, in England, Wales or " Ireland, free from incumbrances except quit rents and other

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"small annual payments, or held upon any lease or leases for "any term or terms of years of which not less than sixty years "shall be unexpired, or in the purchase of stock in the public "funds of Great Britain or Ireland, in Exchequer Bills, South "Sea Stock or Bank Stock, and that the monies or any part of "the monies so invested may be called in, and the payment of "the same and of the interest thereof, or any part thereof "respectively, may be required and enforced when thought "advisable so to do on the part of the said Corporation: Pro-"vided, nevertheless, that no money shall be so invested on "mortgage unless, as a further security for the repayment of "the money invested and the interest thereof, the mortgage be "accompanied with a power of sale exercisable by or on behalf "of the said Corporation." The general effect of this section was, at the date of the proceedings, to permit the general funds of the society requiring investment to be invested only in (a) Mortgaged land in fee simple or held on lease with at least 60 years unexpired; (b) Stock of the public funds of the United Kingdom and (c) Exchequer bills. There had been a steady fall over the years in the value of the society's investments which were all investments of a kind authorized by law for the investment of trust funds. The applicants referred in their affidavit to the decline in value of fixed income and other trustee investments, the size of the funds and the precautions they intended to take in exercising any extended powers that the court might confer on the society, should their application for extended powers of investment be granted.

G. H. Newsom Q.C. and *J. A. Gibson* for the applicants.
Denys B. Buckley for the Attorney-General.

The following cases were cited in argument: *Attorney-General* v. *Governors of Christ's Hospital*[2]; *Berkhampstead School Case*[3]; *Attorney-General* v. *Smart*[4]; *Attorney-General* v. *Middleton*[5]; *Attorney-General* v. *Governors of the Foundling Hospital*[6]; *In re Shrewsbury Grammar School*[7]; *In re Whitworth Art Gallery Trusts.*[8]

DANCKWERTS J. This is a case of some general importance, because it involves a situation upon which the authorities are far from clear. It concerns the Shipwrecked Fishermen and Mariners' Royal Benevolent Society, a charity which was founded for present purposes by an Act of Parliament passed in 1850 dealing with this and certain other charities administered in connexion therewith.

[2] [1896] 1 Ch. 879; 12 T.L.R. 242.
[3] (1865) L.R. 1 Eq. 102.
[4] (1748) 1 Ves.Sen. 72.
[5] (1751) 2 Ves.Sen. 327.
[6] (1793) 2 Ves. 41.
[7] (1849) 1 Mac. & G. 324.
[8] [1958] Ch. 461; [1958] 2 W.L.R. 181; [1958] 1 All E.R. 176.

The Act created a corporation and conferred upon it various powers, but the only one with which I am concerned is the power of investment, and I should like to emphasize that, in my view, it is a power, contained in section 11. [His Lordship read the section and continued:] The present application seeks power to be conferred upon the corporation to invest in a wide variety of investments, including what are sometimes called equities.

It is to be observed that at the time when this Act was passed it was the practice of the Court of Chancery to limit the permissible investment of trust funds to investment in bank annuities. It is plain that this section gave a somewhat wider range than did the Court of Chancery. It is said that the whole of this investment clause is in effect obsolete in the changed circumstances of the present time, and that the benefit and proper execution of the charitable trusts is being hampered or prevented to some extent by the limited nature of the power of investment possessed by the corporation under this Act. The charity is, of course, a statutory charity, that is to say, one founded and regulated by an Act of Parliament. In Halsbury's Laws of England, 3rd ed., Vol. 4, p. 417, it is said in paragraph 868: "*Charity regulated by statute.* The court has no "jurisdiction to interfere in the administration of a charity "established and completely regulated by Act of Parliament, "unless authorized by the Act itself; but the court may make a "scheme in respect of matters not provided for by the Act, and "may enforce the observance of the provisions contained in the "Act."

It is said on behalf of persons interested in the charity that the court is empowered to make a scheme to authorize a wider range of investments in this case, because the matter is not really covered by the very limited power of investment contained in section 11 of the Act of 1850. On the other hand, it is said on behalf of the Attorney-General that that is not the right way to construe section 11 of the Act of 1850: that although in form it is a positive permission, it involves a negative prohibition and, therefore, to allow any wider power of investment of the trust funds would be to attempt to alter the statute by "a stroke of "the pen" and the court has no power to do that.

The cases to which I have been referred are far from clear, but I think the general principle which emerges is that the court cannot alter the said statute by a stroke of the pen and cannot therefore direct anything which is inconsistent with the terms of the Act of Parliament in question. The conclusion which I reach is that to allow a wider power of investment is to confer additional powers of investment and is not, therefore, inconsistent with but is in aid of and supplemental to the powers of investment which are conferred by section 11 of the Act. On that view it would

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be open to the court to allow what has been done by settling a scheme conferring the necessary powers.

It seems to me, however, that the matter can be dealt with in another way, and in many respects I find this alternative preferable. Since the Act of 1850 there have been a number of Trustee Acts which deal with (amongst other things) the investment of trust funds. The present Trustee Act, 1925, contains in its early part powers to invest in a number of things which are plainly outside the ambit of section 11 of the Act of 1850. It has been accepted in the present case, even by the Attorney-General, that the range of investments contained in the Trustee Act, 1925, is open to the corporation for investing its funds. To that extent, therefore, the principle has been accepted that the general Act of 1925 has modified the provisions of section 11 of the Act of 1850. If that be so, why is it not also modified by the provisions of section 57 of the Trustee Act? It seems to me that it is. I cannot see why, if Acts are passed by Parliament seventy-five years after the Act of 1850, they should not be read into the earlier Act and the powers contained in the earlier Act be modified accordingly; and it seems to me that section 57 allows that to be done.

I am aware, of course, that in *In re Royal Society's Charitable Trusts*[1] Vaisey J. expressed the view that section 57 did not apply, but he did not go into the matter fully, because he found himself able to make a scheme which would produce, in the case of the trusts that were before him, exactly the same results as were asked for under the provisions of the Trustee Act. It seems to me that the provisions of section 57 do permit of the court to allow a wider range of investments to be made and to express it in a general order. [His Lordship read section 57 (1) and continued:] The word "investment" is plainly there, so that there seems to me no doubt that the court can authorize the investment by the corporation in a particular fund on a particular occasion. I also find in the subsection that the court may confer upon the trustees the power generally, and therefore I cannot see why the court may not under this power conferred upon the court by the Act give a general power to invest. It seems to me that that could be done in the present case. It really comes to the same thing as the method of a scheme. In either case the situation is one where the court is being asked to do something purely in the administration of the trust. It is not altering the substantive trusts in any way whatever; it is simply giving the trustees power, in the administration of the funds which they have under their control, to administer them in a more satisfactory and more effective way which the changed circumstances of a hundred years show to be necessary for the proper administration of the charity. Accordingly, I am prepared to allow the summons to

[1] [1956] Ch. 87; [1955] 3 W.L.R. 342; [1955] 3 All E.R. 14.

be amended so as to be entitled "In the matter of the Trustee "Act, 1925."

[An order was made referring to section 57 and giving power under that section to carry out the proposed scheme.]

Order accordingly.

Solicitors: *Darley, Cumberland & Co.; Treasury Solicitor.*

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[COURT OF APPEAL.]

In re CUTCLIFFE'S ESTATE. LE DUC *v.* VENESS AND ANOTHER.

[1956 C. No. 1643.]

C. A.

1958 *Nov.* 6, 10, 11.

Hodson, Morris and Ormerod L.JJ.

Probate—Costs of action—Contested probate action—Will duly executed by testator—Contemporaneous declarations by testator that will did not represent his wishes—Whether conduct of testator caused litigation—Whether unsuccessful litigant misled as to testator's intentions entitled to costs out of estate—Unsuccessful plea of undue influence—Rules and exceptions to rules of practice as to costs in probate actions.

The plaintiff, a blind widow, asked for probate of a will in her favour executed on January 31, 1955, by a testator, her stepfather, who died, aged 84, three weeks later. The defendants, a father and daughter, executors and beneficiaries under a will executed by the testator in August, 1954, alleged that the execution of the will of January, 1955, was obtained by undue influence of the stepdaughter, and alternatively that it was made without the testator's knowledge and approval; and by a counterclaim they asked that probate be decreed for the will of August, 1954.

The stepdaughter had lived with and looked after the testator until 1954, but left him after one of a series of quarrels and did not return to his house to live, though she visited him in hospital and at his home towards the end of his life. The defendants, who had been tenants of part of the testator's house since 1952, looked after him continuously after the stepdaughter left. The will in their favour was executed in the presence of a solicitor who had drawn it on the testator's instructions, and it was attested by him and by the testator's own doctor. On January 19, 1955, the testator had an interview with the solicitor, asking for reassurance that his will in favour of the defendants was in order, being under the impression that his "pestering relatives" had wanted him to sign a document which might be a will, and being unable to recall whether he had signed such a document or not. On January 31, 1955, the stepdaughter and two women known to her and to the testator, called on him with a prepared typewritten will in favour of the stepdaughter; and that will was executed by the testator in her presence and was attested by the two women. Two hours later the testator wrote out and signed a document as follows: "9 hrs. 25 mts. January 31, "1955. This is to certify that I . . . have not signed any any

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"document on the above date which I wish to be classified as valid "and in accordance with my wishes." He died on February 24, 1955.

On the trial of the action the judge held that the plea of undue influence failed, and expressly rejected as "invention" direct evidence on that issue given on behalf of the defendants. On the issue whether the testator knew and approved of the contents of the will the judge held that the circumstances were such as to require the stepdaughter to discharge the onus of showing the righteousness of the transaction, but that she had discharged that onus; and he pronounced for the will in her favour.

On the order as to costs, the judge rejected the submission for the defendants that costs should be paid out of the estate on the ground that the litigation had been caused by the conduct of the testator, and ordered that the defendants should pay the costs of the action. On appeal by the defendants against the order as to costs:—

Held, dismissing the appeal, (1) that the judge had rightly followed the ordinary rule of practice applicable in the Probate as in other Divisions that the unsuccessful party should pay the costs of the action; a fortiori where a plea of undue influence had been put forward, supported by direct evidence which had been expressly disbelieved.

(2) That the case did not fall within that exception to the ordinary rule as to costs, whereby judges in probate actions could in the exercise of their discretion award costs out of the estate to an unsuccessful party if the litigation had been caused by the conduct of the testator or of the residuary legatee; for conduct of the testator which, as here, merely had the effect of misleading parties and inspiring false hopes as to his testamentary intentions was outside the range of possible circumstances which might constitute "the fault of the testator causing the litigation." Nor, on the evidence, was the conduct of this residuary legatee the cause of this litigation.

Principles as to costs in probate actions stated by Sir Gorell Barnes P. in *Spiers* v. *English* [1907] P. 122 applied.

Mitchell v. *Gard* (1863) 3 Sw. & Tr. 275, and *Tyrrell* v. *Painton* [1894] P. 151 considered.

Appeal from Collingwood J. with leave against order as to costs.

The plaintiff, Mrs. Annie Le Duc, widow, as executrix, asked for probate of a will dated January 31, 1955, the will of Edmund Perrin Cutcliffe, her stepfather, who died at the age of 84 on February 24, 1955. A caveat was entered by the defendants, Albert Edward Veness and his daughter, Maureen Beatrice Elizabeth Veness, as executors and beneficiaries of an earlier will of the testator dated August 23, 1954. By their defence to the plaintiff's writ they claimed, inter alia, (a) that the execution of the will of January 31, 1955, was obtained by the undue influence of the plaintiff, and (b) that at the time of its execution the testator neither knew nor approved of its contents. By way of counterclaim they asked the court to pronounce against the will and to decree probate of the will of August, 1954.

The plaintiff had lived with the testator in a house, 9, Shirley Road, Bedford Park, Chiswick, after the death in 1941 of her mother, who had married the testator in 1910; and she had looked

after him continuously. She was nearly blind and the testator was not only old but also ill and bedridden. She looked after him with no great pleasure on her part or even apparent gratitude on his, and there were frequent quarrels. In June, 1954, there was a quarrel between them which immediately preceded the stepdaughter leaving the house and going to a home for the blind, and she never returned to the house to live.

The defendant, Albert Veness, as from June, 1952, lived in an upstairs first-floor flat with his wife and the second defendant, their daughter Maureen, paying £3 a week rent to the testator; and from June, 1954, when the stepdaughter left, the Venesses looked after the testator, taking him his food and nursing him generally.

In August, 1954, the testator made a will in favour of the Venesses. For that purpose he called in a solicitor, one R. B., who saw him and was able to take instructions for the will and had a conversation with him about his relations and about his stepdaughter, the present plaintiff. On August 23 that will was executed by the testator in the presence of the solicitor, who was one witness, and the testator's own doctor, who was the other attesting witness. The effect of the will was to leave the property, consisting in the main of a leasehold house, to trustees for the daughter Maureen, the trustees to grant the first-floor flat to Albert Veness and his wife at a nominal rent.

At the trial of the action there was some evidence that, while the testator was in hospital for the first time between December 20 and January 11 the stepdaughter visited him there, and on one occasion was accompanied by a man, who spoke to the sister in the hospital and asked her if she was prepared to witness a will. There was no evidence as to the contents of any document which might have existed at that time. The sister did not give any evidence about it, and nothing further was known of it.

On January 19, 1955, after the testator had returned to his home, the solicitor R. B. attended the testator at 9, Shirley Road. He had been sent for because the testator was concerned about his affairs and wished to know if they were in order. The solicitor's note on his attendance stated as follows: "His "relations (not blood relations) had been pestering him in hospital "and since he had been home. He said they were a lot of blasted "scoundrels and he was determined that whatever they did they "would get nothing from him. He asked me to tell him how he "had left his affairs. He was perfectly coherent and understood "what I said, but his memory was not too good. I explained "to him the will he had made on August 23, 1954, and that he "had left everything to Mr. Veness's daughter. He smiled and "nodded and asked if he could rely on that because that was "what he wanted, and he was worried about what those relatives "who had been pestering him of late had been doing. I told "him not to worry and that his affairs were in order as he "required. He asked if the relatives could have the will set

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" aside because he seemed to think that he had been pressed to " sign some paper by one of them recently . . . I asked him if " he had at any time signed any paper which he believed to be " another will. He did not remember doing so and felt very ill " when in hospital but did recall being asked by one of the " relatives—a nephew by marriage—to sign something but did " not remember whether he did or not. He then said: ' Blast " ' them, they kept pestering me and they still come here and he ' " (meaning Veness) ' lets them see me.' I replied that such " paper if purporting to be a will would be invalid and that he " could rely on my word that his affairs were in order as he " desired."

On January 31, 1955, at about 7.30 p.m., the testator—whose health was not improving, though he was on all the evidence of sound mind—saw the stepdaughter and two other ladies known to her and to him—Mrs. C. and Mrs. B.—who came to his house, bringing with them a will in typewritten form, said to have been prepared by the father-in-law of Mrs. C., a retired solicitor's managing clerk (who had died before the trial of the action). It provided as follows: " I . . . hereby revoke all former wills . . . " and declare this to be my last will. I appoint my stepdaughter " Annie Moseley Le Duc . . . to be the sole executrix of my will. " I give devise and bequeath all my real and personal estate " whatsoever and wheresoever unto the said Annie Moseley Le " Duc absolutely for her sole use and benefit." That will was duly executed and signed by the testator and was witnessed by Mrs. C. who signed herself as " secretary " and by Mrs. B.

The evidence given by the two attesting witnesses commended itself to the trial judge, who found that the deceased knew perfectly well what he was doing and fully understood its effect, and indeed had quite a long conversation over a period of some 40 minutes with the ladies.

Two hours later the testator wrote out in his own handwriting, rather shakily but with a firm signature, the following document: " 9 hrs. 25 mts. January 31, 1955. This is to certify that I " Edmund Perrin Cutcliffe of number nine (9) Shirley Road, " Chiswick, W.4, have not signed any any document on the " above date which I wish to be classified as valid and in " accordance with my wishes. Edmund Perrin Cutcliffe."

That certificate was shown to Albert Veness by the testator on that same evening and was put into a box beside the testator's bed. After his death it came to the knowledge and into the possession of the solicitor R. B. On February 22 the testator was again removed to hospital where he died on February 24.

Part of the evidence of Albert Veness as to what was done with the certificate, and as to the physical condition of the testator on that date, was rejected by the judge in his judgment on May 31, 1958. The judge also rejected the evidence of Mrs. Veness that, while standing outside the door of the testator's bedroom on the evening of January 31 while the three ladies were

with him, she had heard a crescendo of the words "Sign, sign, "sign," uttered by the stepdaughter. The judge described that as an invention; and he accepted the evidence of the two attesting witnesses on what had taken place in the testator's bedroom when the will was executed.

The judge said that the allegation of undue influence might be summarized thus: that the stepdaughter had taken advantage of the testator's age and illness, and had induced him to make a will in her favour, knowing that he was not fit to understand what he was doing; and that she had not been called to give evidence. But the judge said that he found it difficult to believe on the evidence that the stepdaughter was in a position to overbear the will of the testator; and he held that no undue influence had been proved.

His Lordship considered whether there was such an element surrounding the execution of the will as to make it incumbent on the stepdaughter propounding the will to satisfy the court as to the righteousness of the transaction, in accordance with the decision in *Tyrrell* v. *Painton*.[1] He held that it was such a case, but that, as he had accepted the evidence of the two attesting witnesses, the stepdaughter had, in his Lordship's view, affirmatively established that the will of January 31, 1955, was duly executed, that the testator knew and approved its contents, that it expressed his intention at the time, and that he knew what he was doing when he executed it. The judge accordingly pronounced for that will.

On the order for costs, counsel for the plaintiff asked that the defendants should pay the costs of the action, since the evidence of Mrs. Veness had been disbelieved and the defendants had failed on the issue of undue influence. Counsel for the defendants asked that the costs should be paid out of the estate on the ground that the action of the testator himself in making the certificate of January 31 had caused the present litigation. The judge rejected that submission, on the ground that the substantial dispute had been on the allegation of undue influence, "an allega- "tion which ought not to be put forward without very strong "grounds." He ordered that the defendants should pay the costs.

The defendants entered a notice of appeal against the decision on the substantive issues, but later withdrew it, and appealed only on the order as to costs, with the leave of the judge.

C. L. Hawser for the defendants.
Victor Williams for the plaintiff.

The following cases were cited in argument: *Tyrrell* v. *Painton* [1]; *Mitchell* v. *Gard* [2]; *Orton* v. *Smith* [3]; *Davies* v. *Gregory* [4];

[1] [1894] P. 151.
[2] (1863) 3 Sw. & Tr. 275.
[3] (1873) L.R. 3 P. & D. 23.
[4] (1873) L.R. 3 P. & D. 28.

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Wilson v. *Bassil* [5]; *Spiers* v. *English* [6]; *In the Estate of Plant* [7]; *Thomas* v. *Jones* [8]; *Levy* v. *Leo* [9]; *Oldcorn* v. *Tenniswood*.[10]

HODSON L.J. The appeal being as to costs only, it is necessary to state what the position is. First of all, the leave of the judge was given, but, nevertheless, orders as to costs are made in the exercise of discretion and are not readily reviewed unless the court is satisfied that there has been a real error.

So far as any rule of practice is concerned as to costs in probate actions, it is well to remember the wise words of Sir James Wilde in *Mitchell* v. *Gard* [1]: "These questions of costs "are addressed to the discretion of the court. It is hardly in "the nature of discretion that its exercise should be adjusted "by exact rule. No positive regulation could be established "that would bear the strain put upon it by the justice or hardship "of particular instances. But, where all is not possible, some-"thing may yet be done. By acknowledged method and general "classification, the suitor may in some measure be enabled to "estimate the prospect before him, and foresee the penalties "under which he launches into litigation. To this extent it is the "duty of the court, so far as may be, to assist him." It is very important to bear in mind those words when dealing with authorities which purport to lay down general principles on which the exercise of discretion as to costs in these cases are considered.

The most convenient case in which to find the principles on which the Probate Court exercises its discretion as to costs is *Spiers* v. *English*.[2] The headnote sets out the principle very clearly in this way [2]: "The two main principles which should "guide the court in determining that costs in a probate suit are "not to follow the event are, firstly, where the testator or those "interested in the residue have been the cause of the litigation; "and, secondly, if the circumstances lead reasonably to an "investigation in regard to a propounded document. In this "latter case the costs may be left to be borne by those who "incurred them; in the former, the costs of unsuccessfully "opposing probate may be ordered to be paid out of the estate. "Neither of those principles, which, however, are not exhaustive, "justifies a plea of undue influence unless there were reasonable "grounds for putting it forward." The plaintiff, who was a nephew and one of the next-of-kin of Charlotte Spiers, alleged that a will of 1905 was not duly executed, that the deceased did not know and approve of the contents thereof, and that the purported execution was obtained by the undue influence of the defendant. The jury found for the defendant on all the issues, and the court pronounced for the will. The plaintiff—and this is the relevant point—asked for costs out of the estate,

[5] [1903] P. 239.
[6] [1907] P. 122.
[7] [1926] P. 139; 42 T.L.R. 443.
[8] [1928] P. 162; 44 T.L.R. 467.
[9] (1909) 25 T.L.R. 717.
[10] (1909) 25 T.L.R. 825.
[1] (1863) 3 Sw. & Tr. 275, 277.
[2] [1907] P. 122.

or, alternatively, that the court should direct that each party should pay his own costs. The judge came to the conclusion that the plaintiff had not shown any ground on which he ought to order that the costs of the plaintiff should be paid out of the estate, and, therefore, would not interfere with the ordinary rule that the costs follow the event. Sir Gorell Barnes P. was there referring to the ordinary rule that the loser pays. In approaching that conclusion he stated the principles set out in the headnote, and was affected by the fact that, although there was an onus on the defendant to show that the testatrix knew and approved of the contents of her will, the plea of undue influence ought never to have been put forward unless the party raising that plea had reasonable grounds on which to support it. In that situation the order which he made was the ordinary order that costs follow the event, which indeed was the ordinary order which the judge made in this case.

Spiers v. *English* [2] was cited in this court in *Wild* v. *Plant*,[3] apparently with approval, and, so far as I know, that statement of principle as a useful guide to judges who have to exercise their discretion in matters of costs in probate actions has been consistently followed since 1907.

The present case as put before this court was that the judge was in error, in that he did not, at any rate in part, relieve the defendants from the burden of costs, because it is said that it was the fault of the testator that this litigation had been brought about; or, if not the fault of the testator, it was the fault of the beneficiary, namely, Mrs. Le Duc, the residuary legatee. Of course, if either of those qualities were to attach to this case, the judge would be expected, in accordance with the usual practice, to allow the defendants' costs out of the estate, at any rate so far as the issue of knowledge and approval was concerned, although it is admitted that it would be proper to penalize the defendants because they had put forward a plea of undue influence which had failed. [His Lordship then stated the facts set out above, and continued:]

So far as undue influence was concerned, there was no other evidence which could be described as direct evidence of undue influence except the evidence by Mrs. Veness that she heard a crescendo of words "Sign, sign, sign," while standing outside the door while the testator was being, so it was alleged, compelled to sign the will by the stepdaughter who, according to the evidence, had previously been frightened of him rather than he of her. That evidence was expressly rejected by the judge, and, in my opinion, there was no other direct evidence of undue influence. There was evidence as to the weak condition of this man, who was 84 and died in February, 1955, so that he might be fairly described as then a dying man. But the evidence of the defendants' witnesses was undoubtedly regarded by the judge as being

[2] [1907] P. 122.

[3] [1926] P. 139; 42 T.L.R. 443.

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greatly exaggerated. He did not accept it; and the evidence of Dr. Winder, which the judge stated he accepted, does not give such a sad picture of the physical condition of the testator as Veness had sought to give. The document of January 31 and the conversation on January 19 are not in themselves evidence of undue influence against the stepdaughter; but, in my judgment, they are relevant in considering whether the testator knew and approved of the contents of his will dated January 31. They would come under the heading of circumstances which are likely to arouse suspicion in ascertaining facts relating to the execution of the will. The category of these circumstances is not closed, as is shown by the judgment of the Privy Council in *Barry* v. *Butlin*.[4] As for undue influence, not only did the defendants fail to establish their case which was based on the very minimum of direct evidence, but the judge specifically rejected as untruthful the evidence of Mrs. Veness, which was intended to be direct evidence on the issue of undue influence, as to the words "Sign, "sign, sign."

On the other part of the case, the judge recognized that this was one of those cases where the suspicion of the court was aroused, and that the situation was parallel with that which existed in *Tyrrell* v. *Painton*.[5] In that case the testatrix had made wills in favour of the defendant in 1880 and in 1884, but afterwards became dissatisfied with him and made complaints against him. On November 7, 1892, she made a will leaving her property to the plaintiff. On November 9, two days later, the son of the defendant brought the testatrix a will prepared by him, leaving her property to the defendant. The will was executed by her in the presence of and attested by the son of the defendant and a young friend of his. The only evidence adduced by the defendant was that of the attesting witnesses, who were examined, and it was held on appeal that the evidence of the attesting witnesses was not sufficient to remove the suspicion arising from the circumstances under which the later will was prepared and executed, and that the former will must be established. The rule in *Barry* v. *Butlin*[6] was applied by the Court of Appeal, which reversed the decision of the trial judge and found for the earlier will. Davey L.J. said[7]: "It must not "be supposed that the principle in *Barry* v. *Butlin*[8] is confined "to cases where the person who prepares the will is the person "who takes the benefit under it—that is one state of things "which raises a suspicion; but the principle is, that wherever a "will is prepared under circumstances which raise a well-"grounded suspicion that it does not express the mind of the "testator, the court ought not to pronounce in favour of it "unless that suspicion is removed. Here the circumstances were "most suspicious, and the question a judge has to ask himself

[4] (1838) 2 Moo.P.C. 480.
[5] [1894] P. 151.
[6] 2 Moo.P.C. 480.
[7] [1894] P. 151, 159.
[8] 2 Moo.P.C. 480.

" is whether the defendants have discharged themselves of the " onus of showing the righteousness of the transaction, and with- " out going again over the circumstances which might have been " referred to, I am compelled to say that they have not."

This case was fought in part on what I may call the *Tyrrell* v. *Painton* [9] lines and in part on the plea of undue influence. The judge not only rejected the plea of undue influence but found that the plaintiff, although neither she nor her son was called as a witness, had established the will of January 31, as being the will of the testator. The person who was supposed to have prepared the will was a solicitor's managing clerk, who was dead. There was no real evidence that he had prepared the will. Although the evidence on the last will was limited to that of the attesting witnesses, the judge, having heard that evidence and having disbelieved the evidence of the Venesses, expressed himself satisfied that the will of January 31 was the will of the testator. There is now no appeal against that decision. The only appeal is on the question of costs.

On that question it is said that, somehow or other, the judge erred in the way in which he approached the exercise of his discretion. In my opinion, there was no error at all. He considered all those matters which it was material for him to consider, and the transcript of his judgment followed by argument of counsel and the observations of the judge on this topic of costs, shows that he did so.

I do not think, so far as the first exception in *Spiers* v. *English* [10] is concerned, that it can be said that this litigation was brought about by the fault of the testator. It has been argued that because the testator gave a statement to the solicitor on January 19 and left behind him this rather remarkable document of January 31, he was himself responsible for inviting litigation about his estate. I cannot myself subscribe to that view. While it would not be possible to limit the circumstances in which a testator is said to have promoted litigation by leaving his own affairs in confusion, I cannot think it should extend to cases where a testator by his words, either written or spoken, has misled other people, and perhaps inspired false hopes in their bosoms that they may benefit after his death. It does not seem to me that the judges who, in the past, have laid down the practice that costs should be allowed out of the estate where the fault of the testator has led to the litigation, had in mind such a situation as that. The common situation is that which arises day by day in the courts of construction where the testator has used language which is difficult to understand, and where he, by himself or by his solicitor, has created the difficulty; and there the costs are normally borne by the estate. That rule applies particularly in probate actions where, for example, execution is on the face of it doubtful and where, as in *Orton* v. *Smith*,[11] the testator had

[9] [1894] P. 151.
[10] [1907] P. 122.
[11] (1873) 3 P. & D. 23.

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patched up his signature in such a way as to make a handwriting expert suggest that the signature was a forgery and not the signature of the testator at all. I do not think that there is any question here of the litigation being brought about by the fault of the testator.

Similarly, I do not think that any fault is to be attributed to the residuary legatee as being a cause of this litigation. I cannot see that anything can be attributed to her in the way in which this case developed. There was certainly no evidence of undue influence against her accepted by the judge. Unless there is some case of undue influence made out against her, or some reasonable ground for making such a case, there is nothing in the judge's findings as to her conduct which would make it right to say that this litigation was the fault of the residuary legatee. The way in which the judge approached the matter was clear from his concluding words, with which I find myself in complete agreement. When he had been addressed on the question of costs by counsel he showed first that he was in sympathy with the application made by Mr. Hawser for the defendants, because he remarked: "There is a lot to be said for the proposition that "it is the testator who is responsible for this litigation." It was only afterwards, when Mr. Victor Williams, for the plaintiff, had for the second time referred him back to his findings and to the fact that here was a case where there was a plea of undue influence in which the witnesses called to support it had been disbelieved, that the judge came down in favour of the order which he did make. He said with regard to the plea of undue influence: "It is a plea which should not be put forward without "very strong grounds—reasonable grounds at the very least— "and here, as I have already indicated, it has been supported in "the last resort by evidence which I cannot possibly accept— "unfounded evidence. Yes, I must say costs must be paid by "the defendants."

It seems to me a strong thing, which I should be slow to listen to, to maintain that people who give evidence which the judge finds to have been wholly false, who have lost their case, and who have had the costs given against them, should be heard to say that an order for costs should be made either wholly or in part in their favour on the ground that the court in exercising its discretion in these cases is in the habit of exercising it along certain lines and in accordance with certain principles. The discretion of the court is always there, and the rules on which that discretion is exercised are there for the assistance of those who have to advise litigants before they embark on litigation, so that they may have some idea of the risks they run as to costs. It must surely be obvious to anyone who has studied the history of litigation in the Probate Division, notwithstanding the exceptions which are to be found in the books, that where pleas of undue influence and pleas of fraud are made, the probability, at any rate, if they are unsuccessfully made, is that the

people who make such charges and fail will be condemned in the costs not only of that charge but of the whole action.

The evidence in this case was the evidence of the Venesses, and it was directed not only to the question of want of knowledge and approval but also to that of undue influence. A great deal of evidence was directed to both those matters. It was not one of those cases where the defendants merely put the plaintiff to proof that the deceased knew and approved of the contents of the will. They took on themselves the task of proving, if they could, that not only was that onus not discharged but that the will itself was brought into existence by the undue influence of the plaintiff. That they wholly failed to prove. Having failed, and having failed because they were disbelieved, it seems to me inevitable that an order for costs would be made against them. I think that the order was rightly made and that this appeal should be dismissed.

MORRIS L.J. Notwithstanding the powerful submissions of Mr. Hawser, I have come to the same conclusion. Costs are always in the discretion of the court; but, without restricting or in any way making rigid the exercise of that discretion, the courts have given general guidance which will enable those embarking on litigation to know how, in particular cases, the discretion is likely to be exercised. In *Mitchell* v. *Gard* [12] it was said: "From these considerations, the court deduces the two "following rules for its future guidance: first, if the cause of "litigation takes its origin in the fault of the testator or those "interested in the residue, the costs may properly be paid out of "the estate; secondly, if there be sufficient and reasonable "ground, looking to the knowledge and means of knowledge of "the opposing party, to question either the execution of the will "or the capacity of the testator, or to put forward a charge of "undue influence or fraud, the losing party may properly be "relieved from the costs of his successful opponent." In *Spiers* v. *English* [13] Sir Gorell Barnes P. used words much to the same effect: "One of those principles is that if a person who makes a "will or persons who are interested in the residue have been really "the cause of the litigation a case is made out for costs to come "out of the estate. Another principle is that, if the circum-"stances lead reasonably to an investigation of the matter, then "the costs may be left to be borne by those who have incurred "them."

In the present case, quite independently of the issue of undue influence, there were these questions: first, was the testator in any way responsible for the litigation? Was there fault in the testator? Secondly, was this a situation within the *Tyrrell* v. *Painton* [14] principle? As to the latter, the judge said that he

[12] 3 Sw. & Tr. 275.
[13] [1907] P. 122, 123.
[14] [1894] P. 151.

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thought it was within the principle indicated by *Tyrrell* v. *Painton*.[14]

In regard to the question whether the testator was responsible for the litigation, the judge did not, on the view that he formed, have to come to a final conclusion. But he clearly had in mind the matters which Mr. Hawser put before him. For example, he referred specifically to the evidence as to what had been said to the doctor. He also referred to the evidence of the solicitor and to the document that came into existence after the second will was signed.

The judge said that there was a lot to be said for the proposition that it was the testator who was responsible. But he did not proceed to decide that matter for this reason: It was put to the judge that the case had been fought substantially on the evidence of the Venesses, and that their evidence went very considerably to the issue of undue influence. That issue failed completely and it failed because the judge rejected their evidence and, indeed, called it unfounded evidence. Therefore, the judge took the view that, substantially, the case was fought on the evidence of those witnesses and on the issue of undue influence, and that the evidence of the Venesses had on many vital matters been positively rejected. I think that the judge, having that in mind and not forgetting the other considerations that had been put to him, came to the conclusion that the right order in the exercise of his discretion was that the costs should be paid by the defendants. I do not feel that I can say that the judge erred in coming to that conclusion.

ORMEROD L.J. I agree, and I have nothing to add.

Appeal dismissed.

Solicitors: *Manches & Co.; Francis Taylor & Fryzer.*

M. M. H.

[14] [1894] P. 151.

[QUEEN'S BENCH DIVISION.]

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Nov. 12, 13.
Diplock J.

SOUTH AFRICAN DISPATCH LINE *v.* OWNERS OF THE PANAMANIAN STEAMSHIP *NIKI*.

Shipping — Charterparty — Demurrage — Exceptions clause — Charterparty providing for shipment of wide variety of cargo in Coos Bay/British Columbia range—Exceptions clause excusing charterers from "any delay if cargo intended for shipment . . . cannot be . . . "loaded . . . by reason of . . . strikes . . . "—Strike preventing loading of intended cargo of lumber—Extent of delay covered by clause—Charterers' duty to provide alternative cargo within reasonable time.

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A single voyage charterparty of a ship provided for shipment in four districts in the Coos Bay/British Columbia range, loading rotation to be at the charterers' option, a cargo of lumber and/or timber and/or wheat in bulk and/or lawful merchandise, excluding dangerous cargo. The charterparty contained an exceptions clause providing " . . . Charterers shall not be responsible for any delay "if the cargo intended for shipment under this charterparty "cannot be provided, delivered, loaded or discharged by reason "of . . . strikes . . . connected in any way with, or essential to "the providing, delivery, loading or discharging of the cargo . . ."

On June 13, 1952, the charterers booked a cargo of lumber at Victoria, British Columbia, intending on that day to order the ship first to Vancouver to load wheat, thence to Victoria to load the lumber, and thereafter to two American ports to complete loading, but on June 16 a strike broke out which prevented the loading of lumber at all British Columbia ports.

The issue whether the owners would have been allowed to count time lost at Victoria because of the strike as laytime if the vessel had loaded the intended cargo was referred to arbitration, and the umpire, holding that the charterers would have been protected by the exceptions clause from responsibility for delay in loading caused by the strike, made his award in their favour.

On appeal by the owners:—

Held, allowing the appeal, that, since the charterparty permitted the loading of a selection of different cargoes, if the intended one of those could not be provided, the charterers were under a duty to provide another; and that, although the exceptions clause would excuse delay in loading lumber (the intended cargo), it did not excuse a failure to load an alternative type of cargo, the loading of which was not affected by the exceptions clause: that clause excused only delay in loading for such time as was reasonably required for the charterers to make arrangements to obtain and make ready for loading an alternative type of cargo.

Bunge y Born Limitada Sociedad v. *Brightman & Co.* [1925] A.C. 799; 41 T.L.R. 652; [1924] 2 K.B. 619; 40 T.L.R. 876 applied.

SPECIAL CASE stated by an umpire.

A dispute arose between the owners of the Panamanian Steamship *Niki* and South African Dispatch Line, charterers of the ship in connexion with a charterparty dated June 3, 1952, for a single voyage for a lump sum freight of 185,000 dollars. The dispute was submitted to arbitration in accordance with clause 32 of the charter and an umpire gave his award in the form of a special case.

Under the terms of the charterparty the *Niki* was to proceed for shipment to four districts " in Coos Bay/British Columbia " Range within British Institute Warranty limits . . . maximum " six berths; as ordered by charterers, loading rotation to be " North/South or South/North at charterers' option, with " charterers' option of commencing loading on the Columbia " River or Coos Bay, then British Columbia, thence South to " Columbia River to complete . . ." and a wide range of alternative rotations was provided for. Orders for first loading were to be given by wireless on Captain's application four days before due off Estevan wireless station and the cargo to be loaded was

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" a full and complete cargo of lumber and/or timber and/or wood " goods and/or wheat in bulk and/or lawful merchandise, exclud- " ing dangerous cargo and explosives . . . " for shipment to " four " safe ports in Cape Town/Lourenço Marques range . . . "

Clause 4 (the exceptions clause) provided: " . . . Charterers " shall not be responsible for any delay if the cargo intended for " shipment under this charterparty cannot be provided, delivered, " loaded or discharged by reason of . . . strikes or lockouts of " any class of workmen or stoppage of labour connected in any " way with, or essential to the providing, delivery, loading or " discharging of the cargo . . . "

By clause 7 cargo was to be loaded in 14 weather working days, laydays at first loading port to commence 24 hours after receipt of notice of readiness to load, and there were similar provisions for subsequent loading ports. Clause 8 provided for 25 days discharging time and by clause 9 loading and discharging time were to be reversible. Clause 23 provided that laydays were not to commence before July 25 and the cancelling date was July 19.

According to an agreed statement of facts annexed to the special case, on June 13, 1952, the charterers booked 540 mille lumber for shipment at Victoria, British Columbia. They had certain prior commitments and their intention on and after June 13 was to load the following cargo on the *Niki* under the charterparty: at Vancouver—4,050 tons wheat, at Victoria—540 mille lumber, and at Coos Bay, and thereafter at Portland, Oregon, U.S.A., to complete with lumber from two other shippers.

On June 16, 1952, a strike of lumbermen broke out in British Columbia which prevented the loading of timber in British Columbia ports. The strike did not affect any United States ports or places within the charter loading range nor did it prevent or delay the loading of wheat in bulk and/or other lawful merchandise at any British Columbia and United States ports or places within the charter loading range. The charterers were in fact able to load 4,900 tons of wheat at Vancouver after the outbreak of the strike had prevented their loading lumber. The strike continued until July 30, 1952.

Meanwhile, on June 27 the charterers exercised their option and declared to the owners their intention to load in the rotation wheat at Vancouver, lumber at Victoria, and thereafter at Coos Bay and Portland, but in view of the position of the strike on that day they cabled the owners proposing a variation in the rotation. That was in the following terms: " *Niki* now dry-docked " Victoria understand ready to load July 1 Vancouver. Present " itinerary 4,050 tons wheat Vancouver 540 lumber Victoria " thence Coos Portland. 540 mille Victoria subject indefinite " delay account Canadian Mill strike therefore we make owners " following proposal. Will commence Coos first loading district " then British Columbia completing Portland. If 540 mille " Victoria still unready due strike will take 4,900 tons wheat

" provided owners allow 11,000 dollars for loss revenue and cost " restowing lumber."

The owners took the view that under the terms of the charter-party the vessel was not obliged to wait even a reasonable time at Victoria for the 540 mille lumber intended for shipment and that the charterers' proposal was unacceptable. After a number of communications had passed between the parties on July 6 the charterers cabled the following proposal: " We without pre-" judice propose to submit to arbitration the issue whether " owners allowed count time lost Victoria because of strike " as laytime if vessel loads intended cargo. If owners contention " correct owners should not compensate charterers for alternative " cargo and cost re-arranging rotation. If owners' contention " wrong owners to pay for expense of bagging 500 tons of grain " and loss of revenue from shipment of grain instead of Victoria " lumber." The owners agreed to submit the issue stated to arbitration and thereupon the alternative rotation was adopted and the alternative cargo of wheat carried.

Whilst the negotiations were proceeding the *Niki* had, in accordance with the charter provisions, proceeded to Vancouver where notice of readiness was given and accepted on July 2. The ship loaded 4,900 tons of wheat at Vancouver between July 2 and 9 on which day she sailed for Coos Bay, where she loaded lumber, sailing thence to Oregon to complete loading. The total time used for loading was 15 days, 13 hours, 50 minutes. The charterers deducted 11,000 dollars from the freight paid, and that sum was placed in escrow in the hands of agents in New York to await the decision of the arbitrator.

The 540 mille lumber which the charterers declared they intended to ship at Victoria was not identified in the sense that it had been separated out and marked for shipment in the *Niki*. It was not customary to separate, mark or identify lumber for loading in any particular vessel until shortly before the lumber was in fact loaded on the vessel, and there would have been no difficulty or delay about the loading of the lumber if the strike had not occurred.

Before the umpire the charterers contended that at the time they made the booking for the 540 mille lumber, no strike was in existence, nor was a strike inevitable, and they did not and could not know the likely duration of any strike that might thereafter occur; that if the lumber had been loaded clause 4 of the charter-party would have protected them from responsibility for any delay in the loading thereof caused by the strike and, accordingly, they were entitled to have the 11,000 dollars released to them.

The owners contended, inter alia, that at the time the charterers contended that they had booked the lumber the strike was inevitable and was likely to be of considerable duration; that they must be deemed at that time to have had knowledge of the inevitability and duration of the strike; that therefore clause 4 would not have protected the charterers from delay in loading

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caused by the strike if the lumber had in fact been loaded and, accordingly, they were entitled to the 11,000 dollars.

The umpire found, in so far as they were questions of fact, and held, in so far as they were questions of law, that on June 13, 1952, and for some days prior thereto it was probable that the strike would break out shortly after June 14, but that it was not inevitable; that on June 13 no reliable forecast could be made of the likely duration of the strike if it were to break out; that on that date the charterers must be deemed to have had knowledge that the strike was probable but not that it was inevitable and they could not be deemed to have had prior knowledge of its likely duration. If the 540 mille lumber had been loaded, clause 4 would in the circumstances have protected the charterers from responsibility towards the owners for any delay in the loading thereof caused by the strike and the owners would not have been able to count time lost because of the strike as laytime.

Accordingly, he awarded that the charterers were entitled to have released to them the 11,000 dollars, subject to the opinion of the court on the question whether, on the facts agreed and found, they were so entitled. If the question be answered in the affirmative his award should stand. If it be answered in the negative then in lieu of that award the owners would be entitled to have the 11,000 dollars released to them.

R. A. MacCrindle for the owners.
Michael Kerr for the charterers.

The following cases were cited in argument: *Grant* v. *Coverdale* [1]; *Owners of the Steamships Ardgowan, Ardgoil and Buranda* v. *Royal Commission on Wheat Supplies* [2]; *Bunge y Born Limitada Sociedad* v. *Brightman and Co.* [3]; *Brown* v. *Turner, Brightman & Co.* [4]; *Ciampa* v. *British India Steam Navigation Co. Ltd.* [5]; *Steamship "Induna" Co. Ltd.* v. *British Phosphate Commissioners* [6]; *Owners of Steamship Matheos* v. *Louis Dreyfus & Co.* [7]; *Tharsis Sulphur and Copper Co. Ltd.* v. *Morel* [8]; *Bulman* v. *Fenwick* [9]; *Dobell* v. *Green* [10]; *Lewis* v. *Louis Dreyfus & Co.* [11]; *Leonis Steamship Co. Ltd.* v. *Rank Ltd.* [12]

DIPLOCK J. This is a case stated by an umpire arising out of the lumber strike in British Columbia in 1952. It raises a neat point of construction as to an exceptions clause in a charterparty. [His Lordship read the relevant clauses of the charterparty, stated the facts and continued:] The question which party

[1] (1884) 9 App.Cas. 470.
[2] (1923) 15 Ll.L.Rep. 81.
[3] [1925] A.C. 799; 41 T.L.R. 652; [1924] 2 K.B. 619; 40 T.L.R. 876.
[4] [1912] A.C. 12.
[5] [1915] 2 K.B. 774.
[6] [1949] 2 K.B. 430; 65 T.L.R. 149; [1949] 1 All E.R. 522.
[7] [1925] A.C. 654; 41 T.L.R. 393.
[8] [1891] 2 Q.B. 647; 7 T.L.R. 704.
[9] [1894] 1 Q.B. 179; 10 T.L.R. 45.
[10] [1900] 1 Q.B. 526; 16 T.L.R. 204.
[11] (1926) 31 Com.Cas. 239.
[12] [1908] 1 K.B. 499; 24 T.L.R. 128.

is entitled to the 11,000 dollars depends in the first instance on the true construction of the exceptions clause in the charterparty. The first sentence contains the ordinary provision for excepted perils, and the clause then provides: " . . . Charterers shall not be " responsible for any delay if the cargo intended for shipment " under this charterparty cannot be provided, delivered, loaded " or discharged by reason of riots, strikes or lockouts of any " class of workmen or stoppage of labour connected in any way " with, or essential to the providing, delivery, loading or dis- " charging of the cargo, or by reason of floods, fire, ice, frosts, " fogs, bad weather, and all accidents or hindrances or other " cause or causes beyond the control of shippers or receivers " which may prevent or delay the providing, delivery, loading " or discharging of the cargo, including all accidents to piers, " mines, mills, factories or machinery, railway and canal stop- " pages and hindrances, political disturbances, insurrections or " interventions of constituted authorities." It seems to me that I have to construe that exceptions clause in the light of four propositions of law. The first is that prima facie it is the duty of the charterer to have the cargo ready to start loading at the commencement of the laydays: secondly, in an exceptions clause providing for interruption of laydays for excepted perils, prima facie this relates to excepted perils which affect the actual operations of loading, not perils which affect merely the provision of the cargo or its transport to the loading place; thirdly, where a charterparty permits the loading of a selection of different cargoes, the fact that the exceptions clause would excuse delay in loading one type of cargo does not excuse a failure to load an alternative type of cargo, the loading of which is not affected by an excepted peril; fourthly, in such a case, the exceptions clause does excuse delay in loading for such time as is reasonably required for the charterers to make arrangements to obtain and make ready for loading an alternative type of cargo.

It is unnecessary for me to refer to any authorities for those propositions of law other than *Bunge y Born Limitada Sociedad* v. *Brightman & Co.*[1] The decision in the House of Lords[2] is authority for propositions 2 and 3; the decision in the Court of Appeal[3] is authority for proposition 4; although in the House of Lords Lord Dunedin indicated[4] that he was not satisfied that that part of the decision of the Court of Appeal which is the authority for proposition 4 might not require examination at some time by their Lordships' House. It is, however, binding upon me, and, with respect, I also think that it is right. Those are the relevant propositions of law which should form the background of the construction of the exceptions clause, which, like so many clauses in charterparties, succeeds at the same time in

[1] [1925] A.C. 799; 41 T.L.R. 652; [1924] 2 K.B. 619; 40 T.L.R. 876.
[2] [1925] A.C. 799.
[3] [1924] 2 K.B. 619; sub nom. *Brightman* v. *Bunge y Born Limitada Sociedad.*
[4] [1925] A.C. 799, 808.

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being elliptical, tautologous and ungrammatical. First, as regards the ellipsis, " . . . Charterers shall not be responsible for any " delay if the cargo intended for shipment under this charterparty " cannot be provided . . . by reason of . . . strikes . . ." It seems to me that this must be construed as " the charterers shall " not be responsible for any delay in performing their duties as " respects providing a cargo ready for loading," because it is the charterers' responsibility which is referred to, and the charterers' responsibility in relation to loading. " The Charterers shall not " be responsible for any delay in performance of their duties in " providing a cargo ready for loading, if the cargo intended " for shipment cannot be provided by reason of strikes." It seems to me that, as Mr. MacCrindle has pointed out, this relates to causation of delay, and that the words must mean " so far as delay is caused, or to the extent that the delay is " caused by "—the excepted perils or circumstances which follow. The relevant excepted circumstance here is " cargo intended for " shipment cannot be provided for loading by reason of strikes."

What is delay in the performance of the duties of the charterers resulting from the inability to load the intended cargo? That question involves considering what their duties are as regards the provision of cargo. Under this charterparty, they were under a duty to provide any number of alternative cargoes. If, therefore, the particular cargo in this case, timber, could not be provided, the charterers were under a duty to provide another. Their inability to provide the intended cargo may result, and would result, in their acquiring a reasonable time to make alternative arrangements to provide another cargo, but it seems to me that that, and that only, is the extent of the delay caused by a strike affecting only one of the alternative cargoes which the charterer is entitled, and indeed under a duty, to supply. In this case the strike affected only timber or lumber. It did not affect wheat or any other of the cargoes concerned.

Mr. Kerr has contended, as was originally contended by the charterers, that I should read the exceptions clause as entitling the charterers to wait with their arms folded until the strike ended and make no effort to obtain an alternative cargo. He suggested that the purpose of using the words " if the cargo " intended for shipment under this charterparty cannot be pro- " vided," as opposed to the words " if the cargo cannot be " provided," was for the purpose of overruling or getting rid of the effect of the decision in *Bunge y Born Limitada Sociedad* v. *Brightman & Co.*[5] He says that no other purpose can account for the use of the clause in its present form. It seems to me that the reason for the clause in its present form can easily be accounted for as being intended to overcome the general rule that excepted perils affecting the provision or transport of the cargo as opposed to loading do not come within the ordinary

[5] [1925] A.C. 799.

clause. It is to be observed that the words used are: "the cargo "intended for shipment under this charterparty cannot be pro- "vided, delivered, loaded or discharged by reason of"—the various perils, so that the clause was necessary to overcome what I referred to as the second proposition of law relevant to the present case. It was also necessary to define the extent to which interference with provision for loading should be brought within the clause, and to define it very sensibly by limiting it to the cargo which it was the intention of the charterer to load. In other words, it was to give him a reasonable time to make provision for other arrangements, when the arrangements he had already made fell through because of the excepted perils.

I think, therefore, that on the true construction of the exceptions clause, if this vessel had gone to Victoria—as the charterers were entitled to send it—they would not have been entitled, as they claimed, to sit with folded arms and hold it there until the strike ended on July 30. It would have been their duty to make alternative arrangements. It would have been their duty to make preliminary arrangements before they sent the vessel to Victoria, if there was a reasonable likelihood of the strike continuing when the vessel arrived, and to make definite arrangements as soon as it was clear that it would continue. They were entitled to a reasonable time to make those arrangements but to nothing more.

That being my view as to the construction of the charterparty, a question I find more difficult is the proper construction of the agreement to arbitrate, because the matter which depends upon it is the destination of the 11,000 dollars. It is apparent, when one looks at the documents which passed between the parties, and the special case, that the contentions of the parties until the lawyers were allowed within 100 miles of it, were, on the one hand, that the charterers said: "We are entitled to "wait all the time," and the owners said: "You are not entitled "to wait at all." It did not occur to anyone that there might be a half-way house, or a quarter or a tenth-way house (which I think is the more likely figure at which to put it).

A telegram of July 6, 1952, sets out the issue which it was proposed to submit to arbitration. The parties had made their contentions in previous telegrams, the original proposal being that the charterers should make the variation in their rotation and the cargoes, and deduct 11,000 dollars from the freight for loss of revenue in the cost of re-stowing the lumber. In subsequent telegrams the two parties set out their contentions. On July 6 the most important telegram came from the charterers to the owners. It reads as follows: "We without prejudice "propose to submit to arbitration the issue whether owners "allowed count time lost Victoria because of strike as laytime if "vessel loads intended cargo. If owners' contention correct "owners should not compensate charterers for alternative cargo "and cost rearranging rotation if owners' contention wrong

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" owners to pay for expense of bagging." Subsequent arrangements were that, instead of there being payment of the exact sum of the cost of bagging, the 11,000 dollars, which is at present in escrow, should be released to the charterers if the issue was decided in their favour, and if otherwise should be released to the owners.

The issue therefore is this: " Whether owners allowed count " time lost Victoria because of strike as laytime if vessel loads " intended cargo." That seems to me to involve the arbitrators, the umpire and myself in deciding a hypothetical question, because it did not in fact happen. The hypothesis which we have to assume is that the vessel went to Victoria, stayed there until the end of the strike, and then loaded the intended cargo, the timber, and on that hypothesis to answer the question whether the owners would have been allowed to count the time during which the strike continued as laytime. On the true construction of the clause, it may well be that, had the vessel in fact gone to Victoria, the charterers might have been able to make out a case for counting some short period to enable them to obtain an alternative cargo, or possibly a reasonable time for them to consider the possibilities or probabilities of the strike ending more quickly than an alternative cargo could be obtained. I am clear, however, that, in order to take advantage of the exceptions clause in the only way that it is possible that they could have taken advantage of it, it would be necessary for them to show that they had made attempts to obtain an alternative cargo, or, alternatively, that they had considered the matter, or applied their minds to the question whether the strike would end before that could be done. They could not have brought themselves within the exceptions clause without being in a position to show that they had taken that course of action. I think the question as put, namely, " if vessel loads intended cargo," does require me to assume that the charterers took their stand upon the contention which they had put forward, that they were entitled to do nothing but wait for the strike to end, and that accordingly, in answering this question, I am to assume that the charterers could not bring themselves within the exceptions clause in the way which I have indicated as the only way in which they could do it.

I think the question is a difficult one. I feel a little uneasy about the proper construction of this document. On the whole I think the answer to the question as put is that the owners' contention is right, and that, accordingly, the sum of 11,000 dollars ought to be released to them. [His Lordship was then invited by counsel to deal with the submission that a charterer was not entitled to send a vessel to a strike-bound port, and secondly, with the submission that the lumber was not an " intended " cargo because it was not identified:]

It was contended by Mr. MacCrindle, although I did not, in the view I took of the construction of the charterparty, have

to deal with it, that the charterers were not entitled to send the vessel to a strike-bound port when they knew that there was a strike in progress. I do not think that is a good contention. A strike being something which may end at any time, a charterer is entitled to continue to exercise his right under the charterparty to send the vessel to a strike-bound port in the hope and expectation that the strike will be over when he gets there, and I do not think he brings himself out of the exceptions clause by doing so. The owners' safeguard in such a case, in the view which I have taken of this exceptions clause, is that, having sent the vessel to a strike-bound port, it is the charterer's duty to obtain an alternative cargo within a reasonable time if, when the ship gets there, the strike-bound cargo is not available. I apprehend that in considering what a reasonable time to obtain an alternative cargo is one must take into consideration that, in sending the vessel to a strike-bound port, knowing that the strike was on, it would be reasonable of him to make in advance preliminary arrangements for obtaining a cargo if the strike does continue when he gets there. This will thus be no great encouragement for charterers to send vessels to strike-bound ports.

The other matter with which I did not deal, because I have decided the case in Mr. MacCrindle's favour on other grounds, was his contention that the 540 mille of lumber was not an "intended cargo," because it was not identified in the sense that it had been separated out and marked for shipment in the *Niki*, that is to say, it was not identified in any way. In the agreed facts it is stated: "It is not customary to separate, mark "or identify lumber for loading in any particular vessel until "shortly before the lumber is in fact loaded on the vessel, and "there would have been no difficulty or delay about the loading "of the 540 mille lumber if the said strike had not occurred." Mr. MacCrindle, as I understood his argument, contended that the lumber could not be an "intended cargo" until it was identified in some way or other and separated out as being a cargo of particular timber destined for the *Niki*. That consideration seems to me to be appropriate when considering the question of passing the property in the sale of goods. But I think a commercial man who read a charterparty containing a reference to "intended cargo," although he might not think the exceptions clause means what I have now found it to mean, would at least feel that "intended cargo" covered the cargo in this case which had been booked.

The result is that the question of law posed to the court in the special case will be answered in the negative and the alternative award will be upheld.

Appeal allowed.

Solicitors: *Stokes & Mitcalfe; Botterell & Roche.*

E. M. W.

[PROBATE, ETC., DIVISION.]

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Oct. 7, 8, 9, 29.

Lord Merriman P. and Hewson J.

LILLEY *v.* LILLEY.

Husband and Wife—Maintenance—Justices—Wilful neglect to maintain—Wife living apart from her husband on medical grounds—No element of misconduct on the part of the husband—Therefore no wilful neglect to maintain—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4—*National Assistance Act*, 1948 (11 & 12 *Geo.* 6, *c.* 29), *ss.* 42, 43.

A wife who was living apart from her husband because of her medical condition, but without any element of misconduct on the husband's part, applied for an order under the provisions of the Married Women (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had wilfully neglected to provide reasonable maintenance for her. The stipendiary magistrate held that as the husband had not committed any matrimonial misconduct he was not legally liable to maintain the wife and dismissed the complaint. The wife appealed:—

Held, that, as there was no agreement between the parties that the wife should live apart from the husband, or that she should be maintained as a separated wife, and as the ground put forward by the wife to justify her refusal to cohabit with the husband involved no matter of complaint against him, the husband could not be held guilty of wilful neglect to provide reasonable maintenance, and the wife's complaint was rightly dismissed.

Per curiam: The National Assistance Board have an independent right against the husband under sections 42 and 43 of the National Assistance Act, 1948; and under subsection (5) (*b*) of section 43 the board can obtain an order against a husband to pay money to his wife; but this is an order made by virtue of the express liability of the husband to maintain the wife under section 42 of the Act and does not necessarily impute a finding of wilful neglect.

Baker v. *Baker* [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81; *Chapman* v. *Chapman*, unreported C.A., April 4, 1957; *Price* v. *Price* [1951] P. 413; [1951] 2 All E.R. 580n.; *Stringer* v. *Stringer* [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373; dictum of Singleton L.J. in *Keeley* v. *Keeley* [1952] 2 T.L.R. 756, 761; *Starkie* v. *Starkie* (*No.* 2) [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519; *Pinnick* v. *Pinnick* [1957] 1 W.L.R. 644; [1957] 1 All E.R. 873 applied.

Jones v. *Guardians of Newtown and Llanidloes* [1920] 3 K.B. 381; 36 T.L.R. 758; *National Assistance Board* v. *Wilkinson* [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255; *National Assistance Board* v. *Parkes* [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1 distinguished.

APPEAL by a wife against the dismissal on February 26, 1958, by Mr. O'Sullivan, the stipendiary magistrate for Kingston-upon-Hull, of her complaint that her husband had been guilty of wilful neglect to provide reasonable maintenance for her.

The parties were married on October 2, 1948. A child was born on March 13, 1952. The wife's confinement was a difficult one; and thereafter she suffered from a mental or nervous disorder which was either caused or gravely aggravated by the birth of

the child, developing an invincible repugnance to sexual intercourse which was in no way attributable to wilfulness on her part. There was no further marital intercourse after the child's birth. On October 2, 1952, the wife was admitted as a voluntary patient to a mental hospital. On August 18, 1953, on her written request sponsored by the husband, she was allowed to return home. During that period of leave, the wife suffered from attacks of dizziness, and she returned to the hospital on September 15, 1953, where, subject to short absences, she remained continuously until June, 1956, when she went to live with her mother and the child. On October 12, 1954, the wife was granted an order on the ground that she had been deserted by her husband who was ordered to pay maintenance of £2 a week for the wife and £1 a week for the child, the wife being given custody. On August 23, 1957, that order was discharged on the husband's complaint; but at the same time an order was made under the Guardianship of Infants Acts, 1886 to 1926, giving the wife the custody of the child and ordering the husband to pay 30s. a week for the child's maintenance. For a short time thereafter the husband continued to pay £3 per week, but on September 6, 1957, he ceased paying anything beyond the 30s. per week in respect of the child. On January 4, 1958, the wife made the complaint of wilful neglect to maintain, the dismissal of which was the subject of the appeal. Medical evidence was given that it might be disastrous to her mental health to return to her husband even upon a sexless basis. The facts are set out more fully in the judgment of Lord Merriman P.

R. H. Hutchinson for the wife appellant.
Keith McHale for the husband respondent.

In addition to the cases cited in the judgment reference was made in argument to *Read* v. *Legard* [1]; *Papadopoulos* v. *Papadopoulos* [2]; *W.* v. *W.* (*No.* 2) [3]; *Clark* v. *Clark* [4]; *Timmins* v. *Timmins* [5]; *Leng* v. *Leng* [6]; *Thomas* v. *Thomas* [7]; *Everitt* v. *Everitt* [8]; *Whittaker* v. *Whittaker* [9]; *Morton* v. *Morton* [10]; *Dyson* v. *Dyson* [11]; *Dewe* v. *Dewe*.[12]

Cur. adv. vult.

LORD MERRIMAN P., reading his judgment, referred to the nature of the appeal and continued: The parties were married

[1] (1851) 6 Ex. 636.
[2] [1930] P. 55; 46 T.L.R. 44.
[3] [1954] P. 486, 515; [1954] 3 W.L.R. 381; [1954] 2 All E.R. 829.
[4] [1956] 1 W.L.R. 345; [1956] 1 All E.R. 823.
[5] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.
[6] 62 T.L.R. 722; [1946] 2 All E.R. 590.
[7] 62 T.L.R. 166; [1946] 1 All E.R. 170.
[8] [1949] P. 374; [1949] 1 All E.R. 908.
[9] [1939] W.N. 332; 55 T.L.R. 1070.
[10] [1954] 1 W.L.R. 737; [1954] 2 All E.R. 248.
[11] [1954] P. 198; [1953] 3 W.L.R. 1141; [1953] 2 All E.R. 1511.
[12] [1928] P. 113; 44 T.L.R. 274.

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on October 2, 1948. It is evident from one of the magistrate's findings that the marriage went reasonably smoothly until the birth of the child on March 13, 1952. It appears, however, that the husband was always more interested in the sexual side of life than the wife was. The wife's confinement was a very difficult one. The magistrate found that thereafter the wife suffered from some mental or nervous disorder which was either caused or gravely aggravated by the birth of the child. She suffered from periods of acute depression which got progressively worse, and she developed an invincible repugnance to sexual intercourse which, although he had heard no medical evidence at the first hearing, the magistrate described as being "as real and "as overwhelming as a physical disability which made sexual "intercourse impossible"; and said that this state of things was in no way attributable to wilfulness on her part. It is right to say that those conclusions, formed, as I have said, without the assistance of medical evidence, were amply confirmed in the two subsequent cases by the evidence of a Dr. Hendy, whose evidence the magistrate unreservedly accepted.

Dr. Hendy said amongst other things that the neurosis produced an acute revulsion to sexual relations, over which he believed her to have no control; that if she were to return to live with her husband he feared that the result would be disastrous. Asked by the magistrate to say exactly what he meant, he said that she might go over the border into insanity, or over the border into physical disability. The effects would be comparable in any case . . . "Shall I say that there would be a serious breakdown "in her health so as to make her incapable of living a normal "life."

The doctor did not think that living with her husband on condition that there was no sexual intercourse was a reasonable condition for either of them. He thought the fact that the wife cannot bear to be near to her husband was largely due to the sex phobia, a manifestation of the neurosis, but it extended to proximity to her husband and also to men generally, adding that the very fact that a man was near her would set her in a state of anxiety. The doctor gave one recent example of this when she had met her husband accidentally.

Asked about a sexless return to cohabitation, the doctor, questioned by the magistrate, accepted that he meant that even so a reaction might occur when the wife heard the husband's voice or if he were to touch her. He made it clear that this was apart from actual sexual acts, and that he was speaking of the mere fact of having to return and live under a communal roof; repeating that he feared that it would be disastrous to her mental health to return to her husband at all. He said that there was nothing wilful about this state of things at all; that it was an illness.

Cross-examined, he said that he accepted that the wife was

rational and in normal mental health " except so far as it related " to her husband "—and to other men.

It seems to me that the exception goes to the root of the matter, and I will return to this later.

The doctor did not think that there was any great difference in her condition as between August 8, 1957, and the day on which he was then giving evidence.

He also said in cross-examination that it was his firm belief that it was not possible for her to join her husband in his house on any terms whatever.

Finally, in answer to the stipendiary magistrate, he made it quite clear that he was satisfied that the wife could not be said to be " playing up," and that he thought that he would have spotted the symptoms if she had been doing so; that she was probably all right living a quiet life apart from her husband, but was " just managing on very thin ice," and that the possibility of a relapse could not be ruled out.

It is common ground that sexual intercourse had never taken place since some date in February, 1952, that is to say, before the birth of the child. On October 2, 1952, the wife's condition was such that she was admitted as a voluntary patient to the Delapole Hospital at Hull, which is, as I understand, the mental hospital for that district. Dr. Hendy was at all material times the assistant psychiatrist at that hospital, and had the wife under his care while she was there. On August 18, 1953, on her written request sponsored by the husband, she was allowed to return home. It is evident that this period of leave was not a success, as the wife is said to have suffered from attacks of dizziness described as black-outs, and she returned to the hospital on September 15, 1953, where, subject to short absences which I am about to describe, she remained continuously until June, 1956, when she went to live with her mother and the child. Thereafter she has visited the hospital regularly as an out-patient and has been seen by Dr. Hendy about every two or three weeks.

Between April, 1954, and the week-end of June 24–25, 1954, in an attempt to get the wife rehabilitated, she went home for week-ends. It is common ground that this was upon the footing that she and her husband occupied separate bedrooms and that there was to be no question of sexual intercourse. During the latter week-end the husband attempted, in the course of a quarrel, to put his head into the gas-oven. It is evident that the magistrate doubted whether this was a serious attempt, but however that might be, he found that the parting was amicable on the footing that the wife would be returning as usual the next week-end. Towards the end of July, 1954, however, the husband called upon Dr. Hendy and learned from him that in the doctor's opinion the wife's condition was incurable. The husband then saw his solicitor, and on his advice wrote a letter to the wife. As this letter only appears in the magistrate's reasons for the first decision of October 12, 1954, I will record it in full. It is from

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the home address: "August 2, 1954. Dear Jean, Regarding "your persistent request for divorce. In view of that I write to "tell you, that I do not intend to maintain you any longer and "will not be responsible for any debts of any kind. I will only "maintain Margaret. I am therefore taking proceedings for "divorce on the grounds of desertion, as from October 2, 1952. "As it has become apparent to me through Dr. Hendy that you "no longer wish to live with me and that we shall never make a "match of married life. Yours truly, Arthur E. Lilley." The magistrate found that the letter was sent to the wife with the intention, as the husband unequivocally admitted, of stopping her from returning to the matrimonial home and of bringing cohabitation to an end. Accordingly he found that the complaint of desertion was proved.

I pause to observe that at a later stage the magistrate treated this as a case of simple desertion, terminable as such. I must not be taken to assent to this view. In my opinion it was plainly a case of constructive desertion, only terminable as such, inasmuch as the husband intended to compel the wife to withdraw from the limited state of cohabitation which then existed. But for reasons which will appear the distinction has ceased to be important.

On September 8, 1955, the wife wrote to the husband from hospital referring to an interview between them, and saying that there was no chance of a reconciliation, adding: "You know why "this has happened and I ask you not to judge me too harshly." After the wife left hospital in June, 1956, the husband wrote two letters, of July 21 and August 1, suggesting a reconciliation. Both were written on the erroneous assumption that the wife was fully recovered. She did not reply, and the husband wrote on April 1, 1957, again on the same assumption. The wife replied on April 3, 1957, and in one paragraph of her letter she said: "You know how I feel about coming back to you. I wrote you "and gave you a definite answer when I last saw you at the "hospital. My answer is still the same. I shall never be able "to come back and live with you. You know the reasons why. "From a medical point of view it is impossible. If you doubt "my word you need only ask Dr. Hendy and he will confirm "this. Even though I am out of hospital the reasons are still "the same and always will be."

To that the husband replied on April 17, 1957. In this letter he twice expressed his regret for the letter of August 2, 1954, and suggested that she might come home "under the same conditions "as we were before." This phrase has been taken as referring, as it undoubtedly does, to the conditions which had prevailed during the week-end visits before June, 1954, when they occupied separate bedrooms and there had been no sexual intercourse.

The husband's complaint that the order should be discharged on the ground that he had offered to resume cohabitation and the wife had refused, was heard, as I have already said, on August 28,

1957. The magistrate, treating the desertion as simple and the offers as genuine and sufficient to terminate the desertion, discharged the order. It is unnecessary to consider whether the first three letters, founded as they were on the assumption that the wife was completely recovered, were adequate in view of the way in which the husband had brought the cohabitation to an end. The letter of April 17, 1957, was more realistic and penitent in tone and was held to be genuine. Not only was there no appeal against the magistrate's decision to discharge the order, but the trial of the wife's present complaint was conducted below, and on this appeal, on the basis of an unqualified admission that the magistrate's decision of that case was unexceptionable. Accordingly, the wife's complaint, on the cessation of any maintenance for her after September 6, 1957, of wilful neglect to provide reasonable maintenance must be dealt with on the footing that it is accepted that the husband had put an end to the state of desertion created by his letter of August 2, 1954. Further, it was naturally conceded that if the husband, by the discharge of the order of August 23, 1957, had ceased to be a deserter, and the wife's persistent refusal to resume cohabitation created a situation in which she herself became the deserter, there would be an end of her case. Conceding that the husband had ceased to be a deserter, the wife's case is that she has been and still is prevented by the state of neurosis from which she suffers in relation to life with her husband, and that this is a grave and weighty reason justifying her in not resuming cohabitation, even though it does not emanate from any misconduct on the part of the husband; that if she is not a deserter (there being no question of adultery) the husband is liable to maintain her by the common law of England, and therefore his deliberate refusal to do so amounts to wilful neglect.

It must be recognised, I think, that the stipendiary magistrate has actually held the wife to be "in desertion." In the last part of his judgment the magistrate said that he considered that the second and third points made by the husband's solicitor must prevail. These points were: (second) that the husband had no legal liability to maintain his wife because he was not guilty of any matrimonial misconduct, and (third) that this wife is herself now in desertion, and therefore not entitled to the order sought at all.

He added that these points are not necessarily corollaries, and that even though it be assumed that the wife was not in desertion, the husband had not, in his view, wilfully neglected to maintain her.

I do not think, particularly having regard to other observations, that the finding of desertion by the wife is really qualified by the final observations. If so, there is no more to be said, so long as that state of things continues. But I doubt whether it is right to hold that the wife is a deserter.

The stipendiary magistrate stated that he assumes, on the

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part of the wife, a physical capacity to resume cohabitation and a mental capacity to make a rational decision and to form an intention to desert. Having regard, however, to the medical evidence already mentioned, the antithesis between physical and mental capacity seems to me to be of doubtful validity.

The wife's assumed capacity to make a rational decision is based upon Dr. Hendy's answer to the question already quoted, which itself contains the words "except so far as it relates to her "husband," in assenting to which Dr. Hendy said "and to other "men." In the course of the argument we intimated that we were not convinced that a woman suffering from an illness causing the reaction to the mere presence of her husband, or anyone of the male sex, as described by Dr. Hendy, without any question of wilfulness about it, could properly be assumed to be capable of making a rational decision to return to cohabitation or to desert. I am still of that opinion. I think that the stipendiary magistrate was wrong in rejecting the guidance of the Court of Appeal in *Keeley* v. *Keeley*,[1] on the grounds that the wife is no longer in hospital. In my opinion the undisputed medical evidence establishes that, although no longer in hospital, she was just as incapable of resuming cohabitation, whether one describes the incapacity as physical or mental, as the wife in *Keeley* v. *Keeley* [1] would have been held to be if the issue had been properly raised.

For these reasons I do not agree with the stipendiary magistrate that all the elements necessary to constitute desertion were present.

What, then, is the result? Mr. Hutchinson, in final analysis, founded the wife's case on *Keeley* v. *Keeley*,[1] and in particular this passage in Singleton L.J.'s judgment[2]: "If the respondent "is stricken by illness which compels him or her to be in hospital "for the relevant period, it is difficult to see that the petitioner "can prove desertion without cause, and it sems to me that this "reasoning would apply equally in the case of mental illness as "it would in the case of (say) prolonged heart disease. In either "case it should be pleaded and argued." He also relied on the statement of the common law in *Jones* v. *Guardians of Newtown and Llanidloes*,[3] *per* Lord Reading[4] and Shearman J.,[5] *Tulip* v. *Tulip*[6] and *National Assistance Board* v. *Parkes*,[7] and particularly to the judgment of Denning L.J.[8] in the Court of Appeal.

In a very forcible argument, therefore, he submitted that, the wife not being in desertion, though living apart, and there being no question of adultery, the husband is liable to maintain her at common law, and that he has not done so since he deliberately stopped what was described as the voluntary allowance of 30s.;

[1] [1952] W.N. 496; [1952] 2 T.L.R. 756.
[2] [1952] 2 T.L.R. 756, 761.
[3] [1920] 3 K.B. 381; 36 T.L.R. 758.
[4] [1920] 3 K.B. 381, 383–385.
[5] Ibid. 385, 386.
[6] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.
[7] [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1.
[8] [1955] 2 Q.B. 506, 517.

and therefore he is guilty of wilful neglect to provide reasonable maintenance within section 4 of the Summary Jurisdiction (Married Women) Act, 1895.

As to *Jones* v. *Guardians of Newtown and Llanidloes*,[9] it is to be observed that the decision is that the guardians could recover from the husband the cost of the wife's keep incurred by them, thus being in line with the National Assistance Board cases to which I will refer; and to do so on the ground that the wife, a deserter of long standing, had ceased to be so on becoming a pauper lunatic chargeable to the guardians.

It is right to point out, without detracting at all from the validity of the exposition of the common law, which has frequently been followed with approval, that the last ground of the decision did not receive unqualified approval in the House of Lords in *Crowther* v. *Crowther*.[10]

As to *National Assistance Board* v. *Parkes*,[11] and the judgment of Denning L.J. in the Court of Appeal, Collingwood J. and I, sitting in this court, reviewed the whole question in *Pinnick* v. *Pinnick*.[12] I consider that I am bound by that judgment. Even if I am not so, I adhere to it, not less so because it attracted favourable comment in the Law Quarterly Review for October, 1957 (Vol. 73, pp. 453–455).

I do not propose to repeat our reasons now. Suffice it to say we pointed out [13] that in the Divisional Court in *National Assistance Board* v. *Parkes*,[14] Lord Goddard C.J., having explained the practical meaning of a husband's liability at common law, recognized the validity of *Baker* v. *Baker* [15] and the cases in which it has been followed, and pointed out the distinction between decisions under the Summary Jurisdiction (Separation and Maintenance) Acts and claims brought by the National Assistance Board under sections 42 and 43 of the National Assistance Act, 1948; we also doubted [16] whether a case of the latter class was the appropriate occasion for overruling what appeared to be settled law in the former class, especially as judgments of the Court of Appeal were involved; and whether reasoning based on a minority view expressed by Denning L.J. in *Price* v. *Price* [17] was sound. We also expressed the opinion that there was no necessary conflict betwen *Tulip* v. *Tulip* [18] and *Baker* v. *Baker*,[19] and similar cases down to *Price* v. *Price* [20]— in effect because the latter group dealt with the question of the entitlement of a separated wife to maintenance, whereas *Tulip* v.

[9] [1920] 3 K.B. 381.
[10] [1951] A.C. 723, 732; [1951] 1 T.L.R. 1149; [1951] 1 All E.R. 1131.
[11] [1955] 2 Q.B. 506.
[12] [1957] 1 W.L.R. 644; [1957] 1 All E.R. 873.
[13] [1957] 1 W.L.R. 644, 652–653.
[14] [1955] 1 Q.B. 486, 498–499; [1955] 2 W.L.R. 622; [1955] 1 All E.R. 700.
[15] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.
[16] [1957] 1 W.L.R. 644, 655.
[17] [1951] P. 413; [1951] 2 All E.R. 580n.
[18] [1951] P. 378.
[19] 66 T.L.R. (Pt. 1) 81.
[20] [1951] P. 413.

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Tulip [18] dealt with the reasonableness of the amount in the case of an agreed separation.

In this case there was plainly no agreement, either that the wife should live apart or that she should be maintained as a separated wife. The husband is admitted not to be in desertion, and I am assuming that the wife also is not so. The wife only attempts to justify her refusal to cohabit on a ground which involves "no matter of complaint against her husband" (see Halsbury, Laws of England, 3rd ed., Vol. 12, p. 482, para. 1077).

In my opinion, we should not be justified in abandoning the principles laid down by this court in *Baker* v. *Baker*,[21] *Stringer* v. *Stringer*,[22] *Starkie* v. *Starkie* (*No.* 2),[23] and other cases, or by the Court of Appeal in *Chapman* v. *Chapman*,[24] and by the majority of the Court of Appeal in *Price* v. *Price*,[25] in which case Hodson L.J. said [26]: "The question of the wife's right to maintenance may depend on whether she is a deserter, or whether she is deserted, or whether there is a contract between them. I do not think that the law recognises a sort of undefined condition where parties are living apart in conditions which may be described as of drift; or in some not very clearly defined condition in so far as rights to maintenance are concerned." Nor do I think that we ought to ignore the line of decisions in this court that wilful neglect to provide reasonable maintenance involves an element of misconduct—and to do both on the strength of a dictum that the wife is entitled to maintenance because she is a wife, and that *Baker* v. *Baker* [26] and the other cases I have mentioned are overridden. The cases of *National Assistance Board* v. *Wilkinson* [27] and *National Assistance Board* v. *Parkes* [28] decide that if the wife is a deserter the husband cannot be made to contribute to any public assistance given to the wife, but that if she is not in desertion, and there is no question of adultery, the National Assistance Board have an independent right against the husband under sections 42 and 43 of the National Assistance Act, 1948. It is true that under subsection (5) (*b*) of section 43 the National Assistance Board can obtain an order to pay the money to the wife, but this, I emphasise, is an order made by virtue of the express liability of the husband to maintain his wife under section 42, and does not necessarily impute a finding of wilful neglect.

In my opinion that is the true solution of this difficult case. But I do not think that in the circumstances the husband can be found guilty of wilful neglect to provide reasonable maintenance.

[21] 66 T.L.R. (Pt. 1) 81.

[22] [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373.

[23] [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519.

[24] Unreported, April 4, 1951 (extracts from the judgments are cited in *Stringer* v. *Stringer* [1952] P. 171, 179–180).

[25] [1951] P. 413.

[26] Ibid. 421.

[27] [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255.

[28] [1955] 2 Q.B. 506.

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I therefore agree with the stipendiary magistrate's conclusion, although I differ from some of his reasons. Accordingly the appeal will be dismissed.

HEWSON J. I agree with my Lord, and would add that in my view the stipendiary magistrate was right in holding, on August 23, 1957, that the husband was no longer in desertion of his wife. I cannot accept, however, that the wife became a deserter through her refusal to return under the matrimonial roof. She, through her acute state of neurosis, over which she had no control, was quite unable to return to cohabitation with her husband. The uncontradicted medical evidence of Dr. Hendy, which must be looked at as a whole, establishes in my mind that while she was capable of exercising free and reasoned thought in other matters she was quite incapable of such exercise in relation to being under the same roof as her husband, or, indeed, any other man. Dr. Hendy described her case as exceptional, and was of the opinion that a return to her husband would be disastrous to her mental health. As I have said, for my part I cannot, in these extreme circumstances, regard her as a deserter.

If I am right then we are left with the situation that neither party is in desertion of the other. Neither party has a legitimate ground of complaint against the other and I cannot see that the husband can be found guilty of wilful neglect to provide reasonable maintenance for his wife, for, on the evidence, I see no element of misconduct in his attitude. It may be that the answer to this difficult case lies in sections 42 and 43 of the National Assistance Act, 1948, but having in mind, and agreeing with, what the learned President has said, I think that this appeal should be dismissed.

Appeal dismissed: leave to appeal to the Court of Appeal.

Solicitors: *Dawson, Loncaster & Co., Hull; Smith & Hudson for Williamson, Stephenson & Hepton, Hull.*

J. B. G.

[COURT OF APPEAL.]

GRAHAM *v.* C. E. HEINKE & CO. LTD.

C. A.

1958 *Nov.* 26.

[1956 No. G. 2130.]

Lord Somervell, Morris and Pearce L.JJ.

Practice and Procedure—Payment into court—Notice—Form—Factories Act and common law claims—Whether causes of action must be specified in notice of payment in—R.S.C., Ord. 22, *r.* 1 (2).

R.S.C., Ord. 22, r. 1 (2) provides: "Where . . . money is paid "into court in satisfaction of one or more of several causes of action

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" the notice shall specify the cause or causes of action in respect of " which payment is made . . ."

In an action where the plaintiff claimed damages for personal injuries alleged to be due to the defendants' negligence at common law and breach of statutory duty, the defendants, before delivering their defence, made a general payment into court without specifying the cause of action in respect of which the payment was made. The plaintiff did not take the money out and the trial judge awarded him a sum less than the payment in and directed that the defendants should have the costs of the action after the date of the tender.

The plaintiff appealed, asking for increased damages and also contending that the payment in must be regarded as a nullity as it did not comply with Ord. 22, r. 1 (2) by specifying the cause of action in respect of which the payment was made:—

Held (on the point of law), that the purpose of Order 22, r. 1 (2) was to avoid embarrassment, in the technical sense, when damages were claimed under two or more independent causes of action, in cases where the relief claimed was cumulative. Where, as in the present case, the two causes of action were alternative methods of claiming the same relief, the embarrassment which the rule was designed to prevent did not arise, and the rule was inapplicable.

Decision of Donovan J. [1958] 1 Q.B. 432; [1958] 2 W.L.R. 224; [1958] 1 All E.R. 365 on the point of law affirmed; award of damages increased.

APPEAL from Donovan J.[1]

On December 5, 1956, the plaintiff, Reuben Graham, commenced proceedings against his employers, C. E. Heinke & Co. Ltd., for damages for personal injuries sustained while in their employment, which he contended were due to their negligence and/or breach of statutory duty under the Factories Act. On December 28, 1956, before the delivery of their defence, the defendants paid into court under R.S.C. Ord. 22, r. 1, £1,000 and gave notice of the payment to the plaintiff in the following terms: " Take notice " that the defendants, Heinke & Co. Ltd., have paid into court " £1,000 and say that that sum is enough to satisfy the plaintiff's " claim." The plaintiff did not take out that sum.

At the trial of the action the defendants admitted a breach of section 14 of the Factories Act, 1937, but charged the plaintiff with contributory negligence.

Donovan J. found in the plaintiff's favour on the claim, but having awarded only £760 damages he directed that the defendants should have the costs after the date of the payment in. He rejected the plaintiff's contention that the notice of payment in did not comply with the terms of Ord. 22, r. 1 (2), since it did not specify the cause of action in respect of which the payment was made, and should therefore be treated as a nullity.

The plaintiff appealed.

F. W. Beney Q.C. and *Leonard Halpern* for the plaintiff.

Stephen Chapman Q.C. and *John Stocker* for the defendants.

[1] [1958] 1 Q.B. 432; [1958] 2 W.L.R. 224.

Cases referred to: *Nolan* v. *C. & C. Marshall Ltd.*[2]; *London Passenger Transport Board* v. *Upson.*[3]

LORD SOMERVELL, having stated that in his opinion the award of £760 damages was insufficient, and should be increased by £400, continued: A preliminary point was taken on Ord. 22, r. 1 (1), which provides: "Payment into court. 1. (1) In any "action for a debt or damages or in an Admiralty action the "defendant may at any time after appearance upon notice to "the plaintiff pay into court a sum of money in satisfaction of "the claim or (where several causes of action are joined in one "action) in satisfaction of one or more of the causes of action; "provided that with a defence setting up tender before action "the sum of money alleged to have been tendered must be "brought into court." By rule 1 (2): "Where the money is "paid into court in satisfaction of one or more of several causes "of action the notice shall specify the cause or causes of action "in respect of which payment is made and the sum paid in "respect of each such cause of action unless the court or a judge "otherwise order."

I should have said that, on the conclusion I have come to on the first point as to quantum, this point does not arise, because the amount would then be in excess of the amount paid into court; but counsel on each side asked us, if we came to a conclusion on the point, to express it; and although normally I think it is desirable not to decide matters which one does not have to decide, it is right to express the view which I and my brethren hold on this point, which may quite often arise.

The claim here was a claim, as so often arises in these cases, for negligence, or alternatively, for breach of statutory duty; and the point taken was that as the payment into court did not specify the cause or causes of action in respect of which the payment was made, therefore it was a bad payment in, and that leave ought to have been obtained from a court or a judge. One sees, of course, how the point arises on the wording of the rule; but any rule, or indeed, any document, falls to be construed in the light of its purpose, to be gathered from its terms.

The purpose of this rule is to avoid embarrassment, in the technical sense, when damages are claimed under two or more independent causes of action, in cases where the relief claimed is cumulative. A man is claiming under cause A and cause B, and if he wins on both, gets X plus Y in damages. If a sum of money is paid into court, it is difficult for him to know what to do if he does not know how much is allocated to cause A, and how much to cause B. If £250 is allocated to cause A, he may say: "That is all I hope to get under that, so I will take that sum out, "and that will be the end of that." The case will then proceed on cause B. That obviously is the problem with which the rule

[2] [1954] 2 Q.B. 42; [1953] 2 All E.R. 389.

[3] [1949] A.C. 155; 65 T.L.R. 8; [1949] 1 All E.R. 60.

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is intended to deal. But in cases such as this, where the relief claimed is not cumulative, but where the two causes of action are alternative methods of claiming the same relief, not only can the embarrassment which the rule is designed to prevent not arise, but it would also be impossible to comply with the rule by allocating part of the sum paid into one, and part to the other of the two alternative causes of action. On that point, therefore, I think that the judge was right in deciding that there had been no breach of the rule.

MORRIS L.J. I entirely agree.

PEARCE L.J. I agree.

Judgment varied by increasing damages to the sum of £1,160.

Solicitors: *King-Hamilton & Green; Kingsbury & Turner.*

A. W. G.

[HOUSE OF LORDS.]

H. L. (E.)*
1958
Oct. 27, 28; *Nov.* 25.

CARSON (INSPECTOR OF TAXES) . . APPELLANT;
AND
CHEYNEY'S EXECUTOR . . . . . RESPONDENT.

Revenue—Income tax—Discontinuance of trade or profession—Author—Death—Royalties arising from author's contracts—Payment after death—Whether assessable—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Cases II, III, VI.*

After the death in 1951 of C., an author, certain sums due as royalties under agreements made by him were paid to his executor. There were produced four representative examples of these agreements, three dealing with works which at the dates of the agreements were not yet written and in which, therefore, there was not copyright or property, and the fourth dealing with the publication in French of an extant work already the subject of copyright. During his life C. had been assessed to income tax (properly, as the Crown admitted) in respect of royalties received under the agreements as profits arising from the carrying on of his profession as an author under Case II of Schedule D:—

Held, that the payments were the fruit or aftermath of professional activity, whatever the mechanism through which they were paid, and did not change their character when the profession was discontinued. This was equally true of all the contracts here in question and, accordingly, the executor was not liable to be assessed to income tax on sums received under them.

Stainer's Executors v. *Purchase* [1952] A.C. 280; [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071 applied.

Decision of the Court of Appeal [1958] Ch. 345; [1957] 3 W.L.R. 768; [1957] 3 All E.R. 391 affirmed.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM.

H. L. (E.)
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CARSON (INSPECTOR OF TAXES) v. CHEYNEY'S EXECUTOR.

APPEAL from the Court of Appeal (Jenkins, Parker and Pearce L.JJ.).

This was an appeal from an order dated October 21, 1957, of the Court of Appeal, dismissing an appeal by the appellant, Gilbert Carson (Inspector of Taxes) from an order dated June 6, 1957, of the Chancery Division of the High Court of Justice (Queen's Remembrancer) (Harman J.) whereby an appeal by the appellant on a case stated by the Commissioners for the General Purposes of the Income Tax for the Division of Bromley in the County of Kent, was dismissed and the determination of the General Commissioners was affirmed. The question at issue was whether the respondent as executor of the late Reginald Evelyn Peter Southouse Cheyne (known as "Peter Cheyney"), a well-known writer of detective fiction, was assessable to income tax under Schedule D in respect of royalties received by the respondent as such executor under contracts with publishers entered into by Peter Cheyney during his lifetime with a view to the publication of books written or to be written by him.

The facts are fully stated in the opinion of Viscount Simonds.

Sir Reginald Manningham-Buller Q.C. A.-G., *Hilary Magnus Q.C.* and *Alan Orr* for the appellant.

Viscount Bledisloe Q.C. and *C. N. Beattie* for the respondent.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *Liverpool and London and Globe Insurance Co.* v. *Bennett* [1]; *Davies* v. *Braithwaite* [2]; *Beare* v. *Carter* [3]; *Lawrence* v. *Inland Revenue Commissioners* [4]; *Rivell* v. *Edinburgh Life Insurance Co.* [5]

Their Lordships took time for consideration.

November 25. VISCOUNT SIMONDS. My Lords, the question for your Lordships' determination is whether the Commissioners for the General Purposes of the Income Tax, Harman J. and the Court of Appeal were all wrong in holding that the respondent, who is the executor of a well-known writer of detective fiction, known as Peter Cheyney, is not assessable to income tax under Schedule D in respect of royalties which were received by him as such executor under contracts made by Peter Cheyney during his lifetime.

I will summarise the facts as they appear in the case stated by the General Commissioners and the annexed documents.

Peter Cheyney was a writer by profession and he carried on his profession, as writers often do, by entering into contracts with publishers under which, in return for royalties of varying amounts,

[1] [1913] A.C. 610; 29 T.L.R. 757.
[2] [1931] 2 K.B. 628; 47 T.L.R. 479.
[3] [1940] 2 K.B. 187; 56 T.L.R. 762.
[4] (1940) 23 T.C. 333.
[5] (1906) 5 T.C. 221.

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the copyright in his works became vested in them. These contracts which were numerous, took various forms. In some cases, notably in a contract made with Faber & Faber Ltd. relating to a worked described as "provisionally entitled 'Making Crime "'Pay,'" the work in question had not yet been written or at any rate not completed at the date of the contract. In others the work had been completed and there was therefore an existing copyright in it. In one case, which has been regarded as demanding special consideration, the contract took the form of a licence to translate an existing work into French. Subject to what may be said about the last mentioned contract, I do not think that any distinction can validly be made between any of the contracts. In all of them the author carried on his profession by exploiting his work in the usual way. A writer might, I suppose, carry on his profession without doing so, but the Income Tax Acts contemplate the carrying on of a profession for gain and that is what Peter Cheyney did. He was accordingly assessed during his lifetime under Case II of Schedule D in respect of the royalties so received by him after deducting therefrom all proper and allowable expenses of carrying on his profession. There is no doubt that he was rightly so assessed and the learned Attorney-General very properly admitted that he could not lawfully have been assessed under any other Case of any other Schedule. It must be recorded also that he was consistently assessed upon a form of receipts basis being credited with royalties upon the day when they fell due for payment and no account being taken of the present value of royalties due at a future date.

Peter Cheyney died on June 26, 1951. Royalties falling due under the several contracts after his death were received by his executor, and upon him first and additional assessments were made under Schedule D for the years 1951–52 and 1952–53 in the sums of £10,000 and £18,000 respectively. The question is whether they were rightly made. The executor also received sums in respect of contracts made by him with publishers after Peter Cheyney's death and admitted his liability to assessment in such sums. He may have been right or wrong in doing so. That question has not been in dispute nor have their Lordships seen the contracts. The matter is irrelevant to the present issue.

The assessments for 1951–52 are governed by the Income Tax Act, 1918, and those for 1952–53 by the Act of 1952, but there is no material difference between the relevant provisions of the two Acts. It is enough, therefore, to refer to section 123 of the 1952 Act under which income tax is chargeable under Case III of Schedule D in respect of "any interest of money, "whether yearly or otherwise, or any annuity, or other annual "payment," under Case V "in respect of income arising from "possessions out of the United Kingdom" and under Case VI "in respect of any annual profits or gains not falling under any "of the [Cases I to V] and not charged by virtue of Schedule A, "Schedule B, Schedule C or Schedule E."

It was not stated in the assessments under which of the Cases of Schedule D they were made and I understand that it is not considered necessary to do so. Before the commissioners and before the courts below it was contended that they were properly made under Case III or, alternatively, under Case VI. Before this House Case V was also invoked, but in the view which I take nothing turns on this.

My Lords, it was inevitable that a large part of the argument should turn on a recent decision of this House in which two of your Lordships and I took part, the respondent contending that it governed the present case, the appellant that it was distinguishable. I refer to *Stainer's Executors* v. *Purchase*.[1] In that case I said that I agreed with and adopted every word of the judgment of Jenkins L.J. in the Court of Appeal and I repeat what I then said in regard to the judgment of the Court of Appeal delivered by the same Lord Justice in the present case. I therefore absolve myself from the need to compare at length the facts of the two cases and will state as shortly as I can the facts and the principles which appear to emerge from the earlier decision.

Stainer's case,[1] as I will call it, was concerned with assessments made upon the executors of Stainer, a professional film actor and producer (who went by the name of Leslie Howard), in respect of payments made to them under contracts for the exploitation of films to the making of which Leslie Howard had given his professional services as actor or producer or director. The payments consisted of percentages or shares of the profits of exploitation. During his lifetime he was assessed under Case II, his receipts in respect of all his professional activities being brought into account against his proper expenses of carrying on his profession. After his death further payments were made to his executors under the same contracts. It was not suggested that anything further had to be done to earn these payments. They were the reward for Leslie Howard's professional services rendered during his lifetime. It was, however, contended on behalf of the Crown, just as it has been contended in the present case, that they had after the death of Leslie Howard acquired a new taxable quality and, as they were no longer assessable under Case II since no profession was being carried on, were assessable under Case III or Case VI. This contention was decisively rejected. Jenkins L.J. said[2]: "I think it is equally clear that "the assessment to tax of the profits of a profession under Case "II of Schedule D down to the date of discontinuance is to be "taken as covering all remuneration earned in the course of such "profession whether received prior to or after such discon-"tinuance and that, the liability to tax being thus exhausted as "far as remuneration is concerned, nothing which is in truth "remuneration so earned can afterwards be charged to tax merely "because the mode of ascertaining and paying it is such that it

[1] [1952] A.C. 280; [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071.

[2] (1950) 32 T.C. 367, 404.

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"might have been charged to tax under some other Case if it "had not been remuneration so earned." In a speech, in which the other members of the House concurred, I expressed the same view with equal emphasis and less felicity. The principle which emerges is clear. Payments which are in historical fact (I adopt the language of the late Lord Asquith of Bishopstone [3] in the same case) exclusively the fruit or aftermath of professional activities do not change their taxable character when the profession is discontinued.

But there was another aspect of *Stainer's* case [4] which is relevant to the present case. Perhaps it is no more than a different way of stating the same point. It was urged that the contracts made by Leslie Howard were "income bearing assets" and that the payments made to his executors were the income of such assets. To this the same noble Lord gave an answer which I venture to quote, so completely does it dispose of a similar argument in the present case. "The contracts," he said,[5] "in "the present case enjoy, in my view, no such independent "vitality. The consideration for what Mr. Howard was to do— "to act or manage—was not the grant of a contract or contracts "but the payment of money under the terms of those contracts. "Mr. Howard acted for money; he did not act for contracts. "The contracts were mere incidental machinery regulating the "measure of the services to be rendered by him on the one hand "and, on the other, that of the payments to be made by his "employers: they were not the source, but the instrument of "payment, and his death, in my view, did nothing to divest "them of this character." My Lords, I do not see how in the face of this decision the appellant's argument can succeed without a degree of refinement which is to be avoided in the realm of fiscal law. In *Stainer's* case [6] it could not be denied that the taxpayer acquired under his contracts certain contractual rights nor that those rights could in a certain context be called property. So it was argued that the payments were the income and the contracts were the "income bearing assets." I will again content myself with the description given to this argument by Jenkins L.J. and ask how it is to be distinguished from the argument in the present case. When I do so, I find myself using again the same language that Lord Asquith used and I used in *Stainer's* case.[6] What else were these payments than the fruit of Peter Cheyney's professional activities? How is it relevant that in order to reap his harvest he had to enter into contracts under which he acquired rights and incurred obligations as did the publishers with whom he contracted? And how is it relevant that it was a term of those contracts that there should be vested in the publishers a right created by the law to protect him in the exploitation of his work? It was by entering into such contracts that he was able to carry on his profession gainfully. It was

[3] [1952] A.C. 280, 290.
[4] [1952] A.C. 280.
[5] Ibid. 291.
[6] [1952] A.C. 280.

from which tax should be levied as income of property. Thus during his life Mr. Cheyney was assessable under Case II of Schedule D and on his death the royalties from the contracts made by him arising out of the publication of his books were taxable under Case III as annual payments or alternatively under Case VI, or, in the case of royalties accruing abroad, under Case V as income from possessions out of the United Kingdom. The learned Attorney-General expressly disclaimed any right of the Revenue to opt between Case II and Case III during Mr. Cheyney's life.

I have reached the view that the contentions for the Revenue fall to be rejected. But first I would emphasize that we are concerned only with contracts made by Mr. Cheyney. If there are any unexhausted rights in Mr. Cheyney's books which his representatives could turn to account after his death, quite different considerations would arise with which we are not concerned in this case.

I turn accordingly to consider what is involved in the professional activities of an author during his life. An author writes books generally for profit or in the hope of profit. It is only when they make a profit that any question of assessing him on the profits of a profession can arise. It is only by exploiting the work of his brain and his pen that he can make any professional income. The methods of exploitation may take various forms. He may arrange for publication of his works and retain the profits of sale, after deduction of publishers' and printers' and other expenses, for himself. He may sell the copyright of his works in return for lump sum payments, or for royalties on sales, or for both. He may grant use of his works for translation, for film or stage production purposes, for broadcasting or in other ways. He may accept commissions to produce books on agreed terms. Mr. Cheyney seems to have adopted all these methods, except possibly the first, according to the specimen agreements put before us. In my opinion, whichever of these methods an author adopts he is doing no more than pursuing his profession with a view to pecuniary profit. It would be absurd to treat his professional activities as at an end with the production of his typescript, or manuscript, and to treat the rest as merely turning property to gain. An author, unlike an artist, necessarily looks to large-scale reproduction of his book and the greater the number of copies sold the greater will be his income if he has retained the rights in his work in his own hands or has sold them on a royalty basis. He may, of course, sell the rights for a lump sum, and history records many instances of an author having thus disposed of the fruits of his labour for a very inadequate sum. In this last example the sum received will be a receipt of his profession in respect of which he will be taxable. Equally he will be taxable on receipts in the shape of royalties received, or on the profits of publication where he has retained his rights in the book. It is impossible, in my opinion, to treat these receipts

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Stainer's case,[10] I do not think that any of them can throw any light on the present problem. I doubt not that in a proper context royalties may be described as income of an investment as in *Inland Revenue Commissioners* v. *Sangster*[11] nor that, as in *Curtis Brown Ltd.* v. *Jarvis*,[12] copyright royalties may be merged in the receipts of a trade, but I do not think that these cases assist in the solution of the problem now before the House.

The appeal should, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, it appears from the case stated that during his lifetime Mr. Peter Cheyney had entered into from 50 to 60 agreements with publishers to write books, or for the publication of books already written. Four only of such agreements were put in evidence, and it was agreed between the parties that the decision of the court as to sums paid under these four agreements should apply to moneys paid under all other agreements, unless the court should distinguish one of these four agreements from another. It was further agreed that all the agreements made by the deceased from which royalties arose, could, as regards form, be classified into one of the categories of which these four agreements are representative.

The agreements were exhibited to the case and marked respectively A (i), A (ii), A (iii), and A (iv).

My Lords, as regards the agreements A (i) and A (ii), there is, to my mind, no valid distinction between the present case and the case of *Stainer's Executors* v. *Purchase*.[13] In the present case Mr. Cheyney was remunerated for writing books which were "to "be written"; in *Stainer's* case[13] Mr. Leslie Howard was remunerated for producing or directing or acting in films. It is possible to point to differences in the form which the remuneration took, but in each case the remuneration was for professional activities to be carried out by a man carrying on a profession.

In the case of A (iii) it is not quite clear whether the four works to be "delivered" to the publishers had been written or were about to be written, but I see no reason for assuming, in favour of the Crown, that they had already been written, and the Attorney-General did not at any time seek to distinguished this agreement from A (i) and A (ii). Agreement A (iv) is of a somewhat different nature, in that it related to a work already published entitled "Making Crime Pay." By the agreement, the author granted to the publishers the sole licence to translate the work and publish it in volume form in the French language. It could possibly be said that the author had finished his professional activity in regard to the book by writing it, and that the sums to be received under this agreement were income arising from property, namely, from the copyright in the book, within section 122 of the Income Tax Act, 1952, and were taxable under

[10] [1952] A.C. 280.
[11] [1920] 1 K.B. 587; 36 T.L.R. 158.
[12] (1929) 14 T.C. 744.
[13] [1952] A.C. 280.

section 123 of the same Act, either as coming within Case III or, as the publishers were a French firm, within Case V. However, no point of this kind was raised by the Crown during the author's lifetime, and the Attorney-General did not seek now to draw any distinction between this agreement and the other three. I think it can fairly be said that these sums had "the essential quality "of being the fruit of his professional activity," to quote from the speech of Viscount Simonds L.C. in *Stainer's* case,[14] and none the less so because they were received in respect of a completed work. As Jenkins L.J. put it, in delivering the judgment of the Court of Appeal[15]: "It" (that is, the copyright) "was brought "into existence by his professional activity in the writing of "books and by nothing else, and it was just as much part of his "profession to turn his literary labours to account by licensing "the copyright he had created to publishers as it was to write the "books in which the copyright subsisted." If the sums in question had the quality of professional earnings during the author's lifetime, I cannot see that his death in any way changed their quality.

I would dismiss the appeal.

LORD REID. My Lords, Mr. Peter Cheyney, who died on June 26, 1951, was a well-known author. At that date he had some 50 or 60 agreements with publishers in this country and abroad, under which he was entitled to receive from time to time royalties and other sums. During his lifetime he was assessed to income tax under Case II of Schedule D in respect of his earnings in his profession of authorship. The "full amount of "the profits or gains" of his profession was computed by taking as his receipts in each year all sums falling due to be paid to him during the year under these agreements, and deducting all allowable expenses incurred by him during the year. No question arises as to tax due in respect of the period before his death.

Royalties due under these agreements continued to be paid to Mr. Cheyney's executor after his death, and in respect of these royalties assessments under Schedule D were made on the executor totalling £10,000 for the year 1951–52 and £18,000 for the year 1952–53. The executor, the respondent in this appeal, appealed against these assessments, and the assessments were discharged by the commissioners. An appeal against this decision by the present appellant was dismissed by Harman J., and a further appeal was dismissed by the Court of Appeal on October 21, 1957.

A taxpayer, who in any year earns a right to receive money by trading or by the exercise of his profession, may not receive that money or it may not become payable during the year when he acquired the right to receive it. So, when his trade or profession

[14] [1952] A.C. 280, 289.

[15] [1958] Ch. 345, 372; [1957] 3 W.L.R. 768; [1957] 3 All E.R. 391.

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is discontinued, there may be sums, often large sums, outstanding. And there may also be expenses allowable as deductions which he has not yet paid. The question may then arise whether or to what extent such postponed receipts can be taken into computation for income tax purposes. By one method of accounting his profits or gains during each year can be computed by taking, not the sums which he has actually received during the year, but the sums which he has earned during the year. Receipts during the year which have been taken into computation in previous years as having been earned then will not swell the computation for the year in question, but this computation will take account of what has been earned during the year in question though not yet received. In that way, money earned during the continuance of the trade or profession but not payable or received until after its discontinuance would not escape from computation for income tax. But that method was not adopted in the present case. Probably it could not have been adopted, if only because it was impossible to determine the amount of royalties which might ultimately accrue: any estimate of their amount would have been a mere guess.

In the ordinary case of professional earnings, which are outstanding when the profession is discontinued, and which cannot be brought into computation for the period before the discontinuance, it has long been recognised that there is no provision in the Income Tax Acts which subjects them to charge and that they therefore escape from taxation. I need only refer to the statement of the law by Rowlatt J. in *Bennett* v. *Ogston* [16] quoted with approval by my noble and learned friend, Lord Simonds, in *Stainer's Executors* v. *Purchase* [17]: "When a trader or a "follower of a profession or vocation dies or goes out of business ". . . and there remain to be collected sums owing for goods "supplied during the existence of the business or for services "rendered by the professional man during the course of his life "or his business, there is no question of assessing those receipts "to income tax: they are the receipts of the business while it "lasted, they are arrears of that business . . . and are taken to be "covered by the assessment made during the life of the business, "whether that assessment was made on the basis of bookings "or on the basis of receipts." That does not expressly deal with the case where the sums remaining to be collected are of such a character that they could be regarded as annual payments.

Turning to the facts of the present case, it appears to me that the first question to be determined is whether these royalties were professional earnings assessable under Case II during Mr. Cheyney's lifetime; and the second question is whether, if they were professional earnings, they also had some other character by virtue of which they could be assessed to tax under some provision other than Case II either during his lifetime or later

[16] 15 T.C. 374, 378. [17] [1952] A.C. 280, 288.

There is no dispute about the first question. These royalties were in fact assessed under Case II in so far as they were payable during Mr. Cheyney's lifetime. It is not suggested that that was wrong and I think it was clearly right. One way, and perhaps the commonest way, for an author to make money out of his profession is to make agreements with publishers under which he receives royalties. And it appears to me to be impossible to argue that, though an instalment of royalties payable the day before Mr. Cheyney died was part of his professional earnings, an instalment payable the day after his death was not. It might have some other character in addition, but it could not cease to be a part of his professional earnings.

The question, then, is whether these royalties had a dual character: whether in addition to being professional earnings they were of such a character that they could be assessed under some other Case than Case II. The assessments which the Crown seeks to support were simply made under Schedule D, and they would be valid if they could be justified under any Case of that Schedule. The Attorney-General expressly admitted that during Mr. Cheyney's lifetime they could not have been assessed under any Case other than Case II. In my opinion, that admission was properly made, and for this reason. A taxpayer carrying on a profession is entitled to set against his gross receipts all allowable expenses which he has incurred in earning those receipts: he can do that if assessed under Case II, but he could not do it otherwise. The appellant's case must therefore be that, although royalties payable before Mr. Cheyney's death could not be assessed under any Case other than Case II, royalties payable after his death can be so assessed.

It is quite possible for receipts to have such a dual character that the Crown can elect under which Case they shall be assessed. We were referred to some of the insurance company cases, where a large part of the receipts of the company consisted of dividends or interest from investments. Instead of assessing the company on the profits of its business under Case I the Crown is entitled to assess under Case III on the amount of the annual payments received by the company. But that right does not arise only after the company has ceased to carry on business. The nature of the payments received by the company is such as to bring them within the scope of Case III whether the company is carrying on business or not. But in the present case it is admitted that that is not so: the nature of these royalties is such that they cannot be assessed under any case other than Case II so long as the author is following his profession. But it is argued that they can be so assessed after the profession is discontinued. The nature of the royalties does not change on the death of the author; they are still payable under the same contracts, and as I have said, they are still part of professional remuneration. But the circumstances are different because the profession has been discontinued. No further expenses allowable as deductions can be incurred, and

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assessment under Case II is no longer possible. Can this change of circumstances bring within the scope of Case III payments which had formerly not been within its scope?

That question arose in *Stainer's* case.[18] But, before I proceed to examine that case, it may be well to see what are the differences between the facts in the present case and the facts in that case. In both cases the payments in respect of which the executors were assessed were payments of royalties due under contracts made by the deceased which only became payable after the date of his death. In *Stainer's* case [18] they were royalties due to a producer of films: in this case they are royalties due to a writer of books. In both cases earlier payments under the same contracts made during the lifetime of the deceased were admittedly part of his professional earnings. In *Stainer's* case [18] the payments had been earned chiefly by Mr. Stainer, who was known professionally as Leslie Howard, giving his professional services as a producer and actor: there was also an element of copyright in the case but I am prepared to regard *Stainer's* case [18] as simply a case of payment for professional services, the payment taking the form of royalties spread over a considerable period. In the present case there was an element of rendering professional services because some of the contracts were contracts under which Mr. Cheyney undertook to write books for publication by the publishers. But much stress was laid by the appellant on the contention that the contracts were really means adopted by Mr. Cheyney for exploiting property which he had created, his copyright in books which he had written. Some of the contracts were of that character, and, if the appellant cannot succeed with regard to these contracts, he certainly cannot succeed with regard to the others. So I shall consider the present case on the footing most favourable to the appellant, i.e., that the sums assessed were instalments of fees payable under contracts obtained by Mr. Cheyney in exploiting his copyright in books written by him by licensing publishers to publish or translate them.

But I must add that, even so, there is an essential difference between that case and the case of a person who buys a copyright from the author and then proceeds to exploit it by granting licences to publishers. Where the author exploits his own copyright by granting licences to publishers the fees which he receives are admittedly part of his professional earnings, and are not taxable as annual payments under Case III, at least during his lifetime. But, where the author sells his copyright, the price which he receives is part of his professional earnings, and the fees which the purchaser gets from granting licences to publishers are from the beginning taxable as annual payments to him irrespective of whether the author is still practising his profession; they are no part of the author's professional earnings.

In *Stainer's* case [19] the majority of the Court of Appeal held

[18] [1952] A.C. 280. [19] 32 T.C. 367.

that the payments due after Mr. Howard's death were taxable under Case III as annual payments. I think it useful to take some quotations from the judgments because they appear to me to assist in determining what was really decided in that case in this House. Evershed M.R. said [20]: "The question in each case "must be whether the sums in question, once they have ceased "to be capable of taxation under Case II by reason of the fact "that the professional man who acquired the right to receive "them has died or ceased to exercise his profession, nevertheless "have such characteristics as fairly bring them within the com-"pass of the relevant words of Case III," and Somervell L.J. (as he then was) said [21]: "Accepting in favour of the executors "the commissioners' view that these sums, if paid, could not "while Mr. Howard was exercising his profession have been "assessed otherwise than under Case II because they were not "in his hands 'pure income profit' (see *Asher* v. *London Film "Productions Ltd.*[22]), it does not, in my opinion, follow that their "nature may not change if the profession has ceased before they "become payable and are paid." Jenkins L.J. dissented, and with regard to his judgment my noble and learned friend, Lord Simonds, said, with the concurrence of all noble Lords present [23]: "I am conscious that I can add little or nothing to the dissenting "judgment of Jenkins L.J. with every word of which I agree." I quote two passages from this judgment [24]: "It appears to me "that the argument for the Crown involves not merely the exer-"cise of an option but the assertion of a new and distinct liability "to tax arising upon the discontinuance of the profession with "respect to payments on account of the shares of receipts or "profits received after such discontinuance. Perhaps the best "way of putting the point is to describe the shares of receipts or "profits as possessing the dual character of (*a*) professional "earnings, and (*b*) annual payments, the argument being in effect "that so long as the profession was carried on their character as "earnings precluded their assessment as annual payments under "Case III of Schedule D but that on the discontinuance of the "profession this obstacle was removed and the sums in question "became thenceforth simply annual payments to which the pre-"viously potential but suspended liability to tax under Case III "of Schedule D thereupon attached." Having dealt with *Bennett* v. *Ogston* [25] he noted that the Solicitor-General had argued that the instalments were income earned by the exploitation of the films after Mr. Howard's death just as the interest in *Bennett* v. *Ogston* [25] was income earned after the moneylender's death by the use of the money lent in his lifetime. He then said, after dealing with the case of an income-bearing asset received as remuneration, a point to which I shall return later [26]: "I

[20] 32 T.C. 367, 390.
[21] Ibid. 394.
[22] [1944] K.B. 133; 60 T.L.R. 115; [1944] 1 All E.R. 77.
[23] [1952] A.C. 280, 287.
[24] 32 T.C. 367, 402.
[25] 15 T.C. 374.
[26] 32 T.C. 367, 404

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"think it is equally clear that the assessment to tax of the profits "of a profession under Case II of Schedule D down to the date "of discontinuance is to be taken as covering all remuneration "earned in the course of such profession whether received prior to "or after such discontinuance, and that, the liability to tax being "thus exhausted so far as remuneration is concerned, nothing "which is in truth remuneration so earned can afterwards be "charged to tax merely because the mode of ascertaining and "paying it is such that it might have been charged to tax under "some other case if it had not been remuneration so earned."

In this House my noble and learned friend Lord Simonds, after approving the principle stated by Rowlatt J. in *Bennett* v. *Ogston*,[27] expressed a doubt whether that principle was correctly applied in that case—a doubt which I share. He then said, with regard to the instalments[28]: "It appears to me wholly irrelevant "that they were not payable until after his death and equally so "that they were not and could not be quantified until after that "event. They retained the essential quality of being the fruit "of his professional activity. . . . The source of these payments "was the professional activity of Mr. Howard: it was never "anything else. It is true that his remuneration took the form "of annual payments which, if other conditions were satisfied, "might fall within Case III. But other conditions were not "satisfied for ex hypothesi the source of the remuneration was "the exercise of a profession falling within Case II."

In my opinion, the ground of judgment in this House in *Stainer's* case[29] was that payments which are the fruit of professional activity are only taxable under Case II and cannot be taxed under Case III, even when it is no longer possible when they fall due to tax them under Case II, and when looked at by themselves and without regard to their source they would fall within Case III. I am not sure that I fully appreciate the reasons for the decision but I have no doubt that that is what was decided, and I am bound by that decision whether I agree with it or not.

The basis on which the appellant seeks to distinguish *Stainer's* case[29] is, if I understood the argument rightly, that although payments under the agreements in this case had to be treated as falling within Case II and as excluded from Case III so long as Mr. Cheyney was alive, they were not truly the fruit of his professional activity but were truly the fruit of his exploitation of property. I did not understand the Attorney-General to argue that these payments changed their character when Mr. Cheyney died: his argument was that they never had been the fruit of professional activity. I must confess that I do not understand how a payment which is not truly the fruit of professional activity can fall within Case II at any time. Section 123 (1) of the Act provides: "Tax under Schedule D shall be charged

[27] 15 T.C. 374.
[28] [1952] A.C. 280, 289.
[29] [1952] A.C. 280.

" under the following cases respectively, that is to say—. . . Case " II—tax in respect of any profession or vocation not contained " in any other Schedule." I cannot see how " tax in respect of " any profession " can be chargeable in respect of a sum which is not the fruit of a professional activity but is the fruit of something else: it appears to me that, once it is established that these payments were properly chargeable under Case II, it necessarily follows that they must be regarded as the fruit of professional activity and, if that is so, this case appears to me to be indistinguishable from *Stainer's* case.[29]

Finally, I think that I ought to examine certain statements in *Stainer's* case[29] about income-bearing assets because the appellant relied on them. Jenkins L.J. said[30]: " I think it is clear " that if in the course of a profession, an income-bearing asset " is received as remuneration, the income produced by that asset " after the discontinuance of the profession may be taxed as such, " just as the interest accruing after the death of the money-" lender was taxed in *Bennett* v. *Ogston*." [31] Lord Simonds said[32]: " I can well understand that if a professional man " receives as remuneration for his services the sum of £1,000 " 2½ per cent. Consols and retains them, he will suffer deduction " of tax from the interest." And Lord Asquith said[33]: " If " Mr. Leslie Howard had stipulated for payment in blocks of " shares or bonds, or any other instruments which by their " independent vitality generate income, the dividends or interest " might well have been taxable in the hands of his executors." To my mind, if a person receives as part of his remuneration an asset which yields income, that income is not the fruit of his professional activity any more than it would be if that person had received his remuneration in money and had then used that money to buy that asset. From the moment when the asset comes into his hands, the source of any income which it yields is that asset and not his professional activities. There would be no question of the income falling under Case II during his life and then being taxable under some other Case after his death. The receipt by a professional man of income yielded by an asset which has been transferred to him is not a method of gaining professional income whether or not the asset came to him as professional remuneration. But for an author exploitation of his copyright is a method of gaining professional income. Therefore this matter is of no assistance to the appellant's case. I am of opinion that this appeal should be dismissed.

LORD TUCKER. My Lords, I agree for the reasons which have been stated that this case is indistinguishable from the decision of this House in *Stainer's Executors* v. *Purchase*[34] and that accordingly this appeal should be dismissed.

[29] [1952] A.C. 280.
[30] 32 T.C. 367, 404.
[31] 15 T.C. 374.
[32] [1952] A.C. 280, 289.
[33] Ibid. 291.
[34] [1952] A.C. 280.

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LORD KEITH OF AVONHOLM. My Lords, in the view that I take of this case any differences in the specimen agreements produced are immaterial. All are agreements giving certain rights to publishers in respect of books written or to be written in return for remuneration by way of royalties (or sums in advance of royalties) on the books when published and sold. Three of the agreements may be regarded as agreements assigning to publishers, under certain conditions, the copyright in certain books written or to be written and the fourth as conferring rights of translation and publication in French of a book already published in English.

It is conceded that during his life Peter Cheyney was assessed to tax on the royalties obtained under these agreements, under Case II of Schedule D, as a person carrying on the profession of author. The question is whether royalties coming in after his death continue to attract tax. In *Stainer's* case [34] it was held that the remuneration accruing after death for services given during life as actor and producer did not attract tax, as the profession in respect of which the profits and gains were taxable had ceased at the death. The Court of Appeal, Harman J., and the General Commissioners have all taken the view that this case is governed by *Stainer's* case [34] and that the assessment should be discharged. But this case cannot, I think, be treated as a case of remuneration for services rendered. Some of the agreements relate to books already written and the others relate to rights to be conferred in books when they come to be written. An author is not, in my opinion, making a contract for services by entering into an agreement for the publication of a book already created by him. The position may approximate to a contract for services where the author binds himself to write a book and to transfer the copyright to a publisher but I do not find in the agreements here any obligation to write a book. Mr. Cheyney's own interests were no doubt sufficient to secure that the book, or books, would be written. I prefer to treat the case from the angle of approach taken by the learned Attorney-General that these are agreements relating to property of Mr. Cheyney already in existence or to come into existence.

The case for the Revenue, as I understand it, is that the activities of Mr. Cheyney during his life had a dual character. They were the exercise of the profession of an author in writing books and they were at the same time a dealing with the property in the books so created. During his life, or until his retirement, it was the professional aspect of his activities with which the Revenue was concerned and in respect of which he was taxed. With his death this aspect of the matter terminated, or disappeared, and we are left, it is said, only with property in the shape of the books and copyrights created by him. These, so the argument runs, are income-producing assets, on the income

[34] [1952] A.C. 280.

from which tax should be levied as income of property. Thus during his life Mr. Cheyney was assessable under Case II of Schedule D and on his death the royalties from the contracts made by him arising out of the publication of his books were taxable under Case III as annual payments or alternatively under Case VI, or, in the case of royalties accruing abroad, under Case V as income from possessions out of the United Kingdom. The learned Attorney-General expressly disclaimed any right of the Revenue to opt between Case II and Case III during Mr. Cheyney's life.

I have reached the view that the contentions for the Revenue fall to be rejected. But first I would emphasize that we are concerned only with contracts made by Mr. Cheyney. If there are any unexhausted rights in Mr. Cheyney's books which his representatives could turn to account after his death, quite different considerations would arise with which we are not concerned in this case.

I turn accordingly to consider what is involved in the professional activities of an author during his life. An author writes books generally for profit or in the hope of profit. It is only when they make a profit that any question of assessing him on the profits of a profession can arise. It is only by exploiting the work of his brain and his pen that he can make any professional income. The methods of exploitation may take various forms. He may arrange for publication of his works and retain the profits of sale, after deduction of publishers' and printers' and other expenses, for himself. He may sell the copyright of his works in return for lump sum payments, or for royalties on sales, or for both. He may grant use of his works for translation, for film or stage production purposes, for broadcasting or in other ways. He may accept commissions to produce books on agreed terms. Mr. Cheyney seems to have adopted all these methods, except possibly the first, according to the specimen agreements put before us. In my opinion, whichever of these methods an author adopts he is doing no more than pursuing his profession with a view to pecuniary profit. It would be absurd to treat his professional activities as at an end with the production of his typescript, or manuscript, and to treat the rest as merely turning property to gain. An author, unlike an artist, necessarily looks to large-scale reproduction of his book and the greater the number of copies sold the greater will be his income if he has retained the rights in his work in his own hands or has sold them on a royalty basis. He may, of course, sell the rights for a lump sum, and history records many instances of an author having thus disposed of the fruits of his labour for a very inadequate sum. In this last example the sum received will be a receipt of his profession in respect of which he will be taxable. Equally he will be taxable on receipts in the shape of royalties received, or on the profits of publication where he has retained his rights in the book. It is impossible, in my opinion, to treat these receipts

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differently for income tax purposes according to the form which they take. They are stamped throughout as the receipts from a professional activity and they do not lose that character on the death of their producer.

In principle there is no difference between the case where an author sells the copyright and the case where he retains the copyright. What he has produced is not copyright but a book. Copyright is an incident attached by law to the book, fortifying that which he has produced and giving it a value which it would not have if it could be reproduced illegitimately in the shape of pirated editions. The property, then, from which the author obtains his income is the work produced by him and the method by which that work can be turned to profit during his life is in his own hands and is but a projection of his professional activities, the means by which he earns his livelihood from his professional work. If I take the case where he retains the rights in his work and takes the profits to himself it seems to me clear that when he dies any profits that come in afterwards from any issue published during his life are still the profits of what was his profession. It is not possible to say that they are mere income of property, " pure income profit " as it has been called. They are profits not only from writing the book but from bearing all the expenses of selling the book to the public, including the expenses of printing and publishing. They are akin to the profits of a trade but are more properly called the profits of a profession. So it is, in my opinion, where he sells his rights in return for royalties. It is quite unreal to regard these royalties merely as a return from property. They are the reward for all he has put into his work—his labour, his thought, his skill as a writer—and the expenses incurred in creating his book. The position is materially different where rights in a book in return for royalties are granted by another than the author. The elements to which I have referred are entirely absent in such a case. The book is there already made and the idea of royalties as merely the income of property is a more intelligible conception. In Mr. Cheyney's case the position is, in my opinion, accurately and concisely summed up in the words of Jenkins L.J. when he says [35]: " It " was just as much part of his profession to turn his literary " labours to account by licensing the copyright he had created to " publishers as it was to write the books in which the copyright " subsisted." He was treated by the Revenue as earning money in the exercise of his profession by means of the contracts he made. It is not now said, nor could it, in my opinion, be said, that any change in the character of the payments received took place on his death. What is said is that what was latent became patent when his professional activities ceased on his death. But for the reasons I have given there is, in my opinion, no sound ground for this contention.

[35] [1958] Ch. 345, 372.

The difficulties in this and similar cases arise from the fact that assessments to tax are made on a receipts basis, instead of on an earnings basis. It may be that in some professions no more satisfactory basis can be adopted. If the result be, as was suggested, that a large fund of income is thus to go untaxed the remedy would seem to lie in legislation. This is not a *Stainer* case [36] but the principle of that case, I think, applies.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Frere, Cholmeley & Nicholsons.*

F. C.

[36] [1952] A.C. 280.

[QUEEN'S BENCH DIVISION.]

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Oct. 21, 22;
Nov. 21.

Lord Parker C.J., Streatfeild and Diplock JJ.

Criminal Law—Receiving—Misdemeanour—Property obtained in circumstances amounting to misdemeanour—Whether proof of knowledge of specific misdemeanour necessary—Recent possession—Inference of knowledge—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 33 (1).

Where property has been obtained under circumstances which amount to misdemeanour it is still sufficient under section 33 (1) of the Larceny Act, 1916, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained under circumstances which do in law amount to misdemeanour; and it is unnecessary to prove that he knew that the property was obtained under circumstances which amount in law to the specific misdemeanour by which they were in fact obtained. On the other hand, it is not merely sufficient to prove that the receiver knew that the property fell into the wider category of property which has been dishonestly obtained, for that is equally consistent with an erroneous belief that the property was obtained in circumstances which amount to felony.

The defendant was charged on two informations that he received a refrigerator and a television set knowing them to have been obtained under circumstances amounting to a misdemeanour, namely, in the first case, false pretences, contrary to section 33 of the Larceny Act, 1916, and, in the case of the television set, in incurring a debt or liability, obtaining credit under false pretences or by means of other fraud, contrary to section 33. Evidence was given by H. who had obtained the goods in circumstances amounting to those respective misdemeanours, and that she sold them to the defendant at considerably below their true value. The only other evidence for the prosecution was that of a police officer who had found the goods at the defendant's premises. He also produced a signed statement by the defendant in which he denied having bought anything from the first witness except the television set. The justices, being of opinion that there was no evidence that the

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defendant knew of the specific misdemeanour by which the goods had been obtained, dismissed the informations:—

Held, (1) that, although it was not sufficient to show that the defendant knew that the goods were obtained by some dishonest means and the prosecution must show that he knew that they were obtained in circumstances which amounted to misdemeanour as opposed to felony, it was not necessary for the prosecution to show that the defendant knew the precise nature of the misdemeanour by which the property was obtained.

But (2) that where property had been obtained under circumstances amounting to misdemeanour, the inference could not be drawn from its being found in the defendant's possession that he knew that it had been obtained in this way as opposed to having been stolen; and, although there was evidence that the defendant knew that the goods had been obtained by dishonest means sufficient to support a charge of receiving goods knowing them to have been stolen, it was not sufficient to show that he knew that they had been obtained in circumstances amounting to a misdemeanour and, accordingly, he was entitled to be acquitted.

Observations on "doctrine of recent possession."

CASE STATED by Edmonton justices sitting at Tottenham.

On May 2, 1958, the defendant, Brian Douglas Nieser, a second-hand dealer, was charged on two informations which alleged that he (1) "On a day unknown between June 12, 1956, "and June 30, 1956, at Tottenham, received a 'Morphy "'Richards' refrigerator to the value of £54 knowing it to have "been obtained under circumstances amounting to a mis-"demeanour, that is, by false pretences, contrary to section 33 "of the Larceny Act, 1916[1]" and (2) "On a day unknown "between August 18, 1956, and August 31, 1956, received a "'Sobell' television set to the value of £71 10s. knowing it to "have been obtained under circumstances amounting to a mis-"demeanour under section 13 (1) of the Debtors Act, 1869, that "is, in incurring a debt or liability, obtaining credit under false "pretences or by means of other fraud, contrary to section 33 "of the Larceny Act, 1916." The defendant elected to be tried summarily and pleaded Not Guilty.

According to the case the following was a summary of the evidence called for the prosecution.

Evidence was given by a Mrs. Honey that she had pleaded Guilty to obtaining the "Morphy Richards" refrigerator by false

[1] Larceny Act, 1916, s. 33 (as amended by the Criminal Justice Act, 1948, s. 1 (1)): "(1) Every person "who receives any property knowing "the same to have been stolen or "obtained in any way whatsoever "under circumstances which amount "to felony or misdemeanour, shall be "guilty of an offence of the like degree "(whether felony or misdemeanour) "and on conviction thereof liable—(*a*) "in the case of felony, to imprison-"ment for a term not exceeding "fourteen years; (*b*) in the case of "misdemeanour, to imprisonment for "a term not exceeding seven years; ". . . (4) Every person who, without "lawful excuse, knowing the same to "have been stolen or obtained in any "way whatsoever under such circum-"stances that if the act had been "committed in the United Kingdom "the person committing it would have "been guilty of felony or misdemean-"our, receives or has in his possession "any property so stolen or obtained "outside the United Kingdom, shall "be guilty of an offence . . ."

pretences and she produced the credit sale agreement dated June 12, 1956, under which she obtained it. She said that she had written " Edward Smith " on the agreement as the name of the purchaser; that she had paid a deposit of £4; and that the value of the refrigerator was £58 10s. She said that before she got the refrigerator she went to see the defendant in a shop which he ran, told him that she was getting a " Morphy Richards " refrigerator and asked him if he would like to buy it. The defendant had said that he would like to buy it and she had then gone and obtained it. The refrigerator was delivered to her house, where it was never installed but remained standing in the hall. She told the defendant when it arrived and that the same day he collected it late at night, about six hours after it had been delivered to her. The price the defendant was to pay for the refrigerator was not agreed until after the refrigerator was delivered to Mrs. Honey. She then asked £30 for it but the defendant did not agree to that and paid her £25. With regard to the second information, Mrs. Honey said that she had obtained a " Sobell " television set on credit sale terms and produced the agreement dated August 18, 1956, relating to the set. The agreement showed the credit sale price was £90 6s. She said that she ordered the set, but that the agreement was put in the name of her son, Edward Honey, who signed the agreement; and that she had also signed it " E. Honey " as guarantor. She said that when the set was delivered to her she sold it almost immediately to the defendant; that it was not used in her house and that no aerial was put up; that she told the defendant when it arrived and that he came at night-time and took it away. She asked the defendant for £40 for the set, but he would not give her more than £35, which she accepted.

The only other evidence given for the prosecution was that of a police officer who said that he saw the defendant on September 11, 1956, at the defendant's premises. He told the defendant that he was making inquiries about a " Sobell " television set sold to the defendant by Mrs. Honey. At first the defendant was very hostile and said: " I don't know what you're talking about." He then made a statement, which he signed. The effect of this statement was that he was a second-hand dealer; that he knew Mrs. Honey, though not by name; that she came to his shop and asked if he was interested in buying a television set; that he went round to her house to look at the set; and agreed to buy it; that he gave her £40 for it and took the set home; that he had never bought anything else from Mrs. Honey. He identified the set as the one in his sitting room. The police officer called again at the defendant's house on September 13, 1957, when he saw a " Morphy Richards " refrigerator on the landing upstairs. He found that it bore the same serial number as was shown on the credit sale agreement produced by Mrs. Honey. He then saw the defendant, cautioned him and told him that he had seen the refrigerator which bore the same serial number as was shown on the credit sale agreement, and that the refrigerator had been sold

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on credit sale terms to E. Honey on June 12, 1956. He showed the agreement to the defendant and asked him why he had previously denied that he had bought anything else from Mrs. Honey. The defendant replied: "I don't know where I got it from. I "never got it from her; I don't know where it came from." The officer asked him if he had given or obtained a receipt for it. The defendant replied: "I don't bother about things like that." The defendant's mother, in his presence, then said that her previous husband had bought it in 1955, whereupon the officer pointed out that that could not be possible as the refrigerator had not been issued to the public until June 12, 1956. The defendant then said: "All right, you know so much get on with it, I'm not saying "any more." The officer arrested the defendant on April 24, 1958, read the warrant to him and cautioned him. The defendant made no reply then or later when formally charged.

At the end of the prosecution's case, the defendant's counsel submitted that there was no case to answer. The submission was on two grounds, one of which applied to the second information only and was abandoned on appeal. The second ground was that, as regards the refrigerator, where the misdemeanour alleged was false pretences, there was no evidence as to any false pretence having operated on the mind of the defendant; that the only evidence was that Mrs. Honey had pleaded Guilty to obtaining it by false pretences: the vital false pretence question had not been asked. It was submitted that the prosecution had to show that the defendant knew, in respect of the charge relating to the refrigerator, that it had been obtained by false pretences in accordance with the particulars of that charge; and that the defendant knew, in respect of the charge relating to the television set, that it had been obtained by incurring a debt or liability, or obtaining credit by false pretences or by means of other fraud, contrary to section 33 of the Larceny Act, 1916, and that in these cases the prosecution had not produced any evidence to show that this was the case.

It was contended on behalf of the prosecution that the prosecution were not required to prove that the defendant had knowledge of exactly what misdemeanour Mrs. Honey had committed. It was pointed out that in a case of receiving stolen goods, the prosecution might call the thief to say that he sold the stolen goods to the receiver; but that the thief did not normally state in evidence that he told the receiver that he had stolen them: the guilty knowledge in such a case was presumed from other circumstances, such as the price at which the receiver bought the goods, or his denial that he had them. The prosecution contended that, following that analogy, where the charge related to the second limb of section 33 of the Larceny Act, 1916, i.e., receiving goods that were not stolen, but were "obtained in "any way whatsoever under circumstances which amount to "felony or misdemeanour," the circumstances amounting to a misdemeanour could be proved by the principal offender (Mrs.

Honey in this case); and the defendant's guilty knowledge could be proved by: (*a*) the fact that he, a second-hand dealer, paid only about half price for goods which were clearly in new condition, as they had not been installed in Mrs. Honey's house; (*b*) the fact that he knew that Mrs. Honey was going to get the refrigerator and bought it from her at a low price as soon as she got it; (*c*) the fact that, so far as the refrigerator was concerned, he denied that he had bought anything other than the television set from Mrs. Honey; (*d*) the fact that he bought the television set from her after he knew the circumstances in which the refrigerator was obtained; (*e*) the fact that he, a dealer in second-hand furniture, said that he did not bother about receipts when he bought the refrigerator and did not know where he had got it; (*f*) the fact that both articles were used in the private part of the house, and formed no part of the effects of the business of the shop.

The prosecution contended that it was not necessary that Mrs. Honey should be proved to have said to the defendant: "I got "the refrigerator by false pretences and I got the television in "the course of getting credit by fraud"; but that there was evidence that those misdemeanours had been committed and that the defendant's guilty knowledge of the circumstances in which the goods were obtained was proved by items (*a*) to (*f*) above.

The justices were of opinion that Mrs. Honey had obtained the refrigerator and the television set in circumstances which amounted to the misdemeanour alleged in the informations and that the defendant had bought them from her. They were further of opinion that from the evidence as to the prices paid by the defendant, his statement that he did not bother about receipts, his signed statement that he had bought nothing other than the television set from Mrs. Honey and his other statements and conduct on September 13, 1957, when seen by the police, there was some evidence that he knew, at the time that he received them, that the goods had been obtained by some dishonest means. They were, however, of opinion that there was no evidence that the respondent knew (*a*) that it was by false pretences that Mrs. Honey had obtained the refrigerator, and (*b*) that it was while getting credit by fraud that Mrs. Honey had obtained the television set. They accordingly found that there was no case to answer on either information, dismissed both informations and discharged the defendant.

The prosecutor appealed.

J. H. Buzzard for the prosecutor.
W. M. F. Hudson for the defendant.

No cases were cited in argument on the second ground of submission of no case to answer.

Cur. adv. vult.

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November 21. LORD PARKER C.J. Diplock J. will deliver the judgment of the court.

DIPLOCK J. read the following judgment: This court reserved judgment, because, in the course of argument, there emerged an important question of principle as to the essential ingredients of the offence or offences created by section 33 (1) of the Larceny Act, 1916, which does not appear so far to have been judicially decided, and which is particularly important in an age when transactions by way of credit sale agreements are becoming increasingly common. [His Lordship stated the facts and continued:]

At the end of the prosecution's case the defendant's counsel submitted that there was no case to answer. The submission was on two grounds, one of which applied to the second information only, and was abandoned in this court. It is sufficient to say that it was based on a misunderstanding of the decision in *Rex* v. *Schweller*,[1] which found some support in a passage in former editions of Archbold which has been deleted in the most recent edition.

The second ground of submission applied to both informations and was based upon the contention that to sustain a charge of receiving property knowing it to have been obtained under circumstances amounting to a misdemeanour which is specified in the charge it is necessary for the prosecution to prove that the accused knew that the property had been obtained by the misdemeanour so specified and not in some other, albeit criminally, dishonest way.

It was contended by counsel for the Crown that just as in a charge of receiving stolen goods knowing them to have been stolen it is unnecessary for the prosecution to prove that the accused knew of the details or even the particular form of the stealing, but that it is sufficient to prove that the accused knew that the property had been stolen generally, so, by analogy, in a charge of receiving property knowing that it has been obtained under circumstances amounting to a misdemeanour, it is unnecessary for the prosecution to prove more than that the accused knew of the circumstances amounting to a misdemeanour generally, without showing that he knew of the particular misdemeanour. He conceded that in a charge of receiving property knowing it to have been obtained under circumstances amounting to misdemeanour it would be insufficient, and indeed would be an effective defence, if it were shown that the accused believed, although erroneously, that the goods had been stolen; but he contended that under the doctrine of "recent possession," which, on the evidence, was applicable to this case, the justices were entitled to infer that the accused knew the true facts as to the circumstances in which the goods were unlawfully obtained by Mrs. Honey.

[1] (1924) 18 Cr.App.R. 52.

The justices accepted the defendant's submission as correctly stating the law. They said in paragraph 6 of the case: "We were "of opinion that Mrs. Honey had obtained the refrigerator and the "television set in circumstances which amounted to the misde- "meanours alleged in the informations and that the [defendant] "had bought them from her. We were further of opinion that "from the evidence as to the prices paid by the [defendant], his "statement that he did not bother about receipts, his signed state- "ment that he had bought nothing other than the television set "from Mrs. Honey and his other statements and conduct on Sep- "tember 13, 1957, when seen by the police, there was some "evidence that he knew, at the time that he received them, that "the goods had been obtained by some dishonest means. We "were, however, of opinion that there was no evidence that the "[defendant] knew (*a*) that it was by false pretences that Mrs. "Honey had obtained the refrigerator, and (*b*) that it was while "getting credit by fraud that Mrs. Honey had obtained the tele- "vision set. 7. We accordingly found that there was no case to "answer on either information. We therefore dismissed both "informations and discharged the [defendant]."

The question of law put for the consideration of this court is whether the justices were correct in holding that there was no case to answer on either information. This involves two questions: (*a*) What knowledge of the circumstances under which property was criminally obtained by a third person must be shown to have been possessed by the accused in order that an offence of receiving property obtained under circumstances which amount to misdemeanour, contrary to section 33 (1) of the Larceny Act, 1916, may be made out? (*b*) Was there any evidence in this case which would have entitled a jury to find that he in fact possessed that knowledge? The answer to the first question depends upon the true construction of section 33 (1) of the Larceny Act, 1916. [His Lordship read the subsection and continued:] This phraseology contains two ellipses. The nature of the first of these is apparent in comparing the language of subsection (1) with that of subsection (4) of the same section, which deals with very similar offences. Subsection (1) speaks of "any property." It is only the presence of the word "knowing" followed by a statement of the facts known which connotes that these facts are true and thus by implication qualifies the generality of the expression "any property" by limiting it to "property which has been stolen or obtained in any way what- "soever under circumstances which amount to felony or mis- "demeanour."

The first part of the subsection expanded to fill these ellipses would thus read: "Every person who receives any property "(which has been stolen or obtained in any way whatsoever "under circumstances which amount to felony or misdemeanour) "knowing the same to have been stolen or obtained in any way "whatsoever under circumstances which amount to felony or

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" misdemeanour shall be guilty of an offence . . ." Pausing at this point it is relevant to observe that the phrase " under cir- " cumstances which amount to felony or misdemeanour " must qualify the participle " stolen " as well as " obtained," for some stealing is neither felony nor misdemeanour but a summary offence only. Receiving goods stolen under circumstances which amount to a summary offence is excluded from the subsection; it is dealt with separately by the unrepealed section 97 of the Larceny Act, 1861. This construction of subsection (1) is reinforced by comparing its wording with the less elliptical wording of subsection (4), which refers to " property so stolen or " obtained " and not to " property stolen or so obtained."

The second ellipsis is to be found in the words " guilty of an " offence of the like degree (whether felony or misdemeanour)." The offence to which that committed by the receiver is to be " of " the like degree (whether felony or misdemeanour) " is an offence other than that of which the receiver is himself guilty and must be the only other offence alluded to in the subsection. It is tempting, having filled the first ellipsis, to say that this offence is the actual offence committed by the person by whom the property was in fact stolen or obtained, irrespective of whether its degree was known to the receiver; but this we think would be fallacious, since the only express allusion to another offence contained in the subsection is to the offence " known " by the receiver to have been committed.

Subsection (1), expanded to fill the two ellipses, thus reads: " Every person who receives any property (which has been stolen " or obtained in any way whatsoever under circumstances which " amount to felony or misdemeanour) knowing the same to have " been stolen or obtained in any way whatsoever under circum- " stances which amount to felony or misdemeanour shall be " guilty of an offence of the like degree (whether felony or mis- " demeanour) (as the degree of offence known by such person " to have been committed by the person by whom such property " was stolen or obtained) and on conviction thereof liable (*a*) in " the case of felony to imprisonment for any term not exceeding " fourteen years; (*b*) in the case of misdemeanour to imprisonment " for any term not exceeding seven years."

The subsection thus creates two classes of offence, one a felony, the other a misdemeanour, according to the circumstances in which the property received was stolen or obtained. It treats property as falling into two classes: (1) property which has been stolen or obtained in any way whatsoever under circumstances which amount to felony and (2) property which has been stolen or obtained in any way whatsoever under circumstances amounting to misdemeanour; and it requires, as an ingredient of the offence, knowledge by the receiver of at least the category into which the property he has received falls.

Does it require more specific knowledge by the receiver than this of the nature of the offence committed by the person by

whom the property was stolen or obtained? Neither the structure of the subsection itself nor its antecedent legal history compels us to such a conclusion.

At common law the offence of receiving was a misdemeanour and was limited to cases of property which was stolen. There is ample authority that in cases of stolen goods, which are by far the most frequent subject of receiving charges, it is unnecessary to prove detailed knowledge by the receiver of the circumstances of the original taking and this was so, not only at common law, but also under the Larceny Act, 1861, and is still so under the present subsection. The Larceny Act, 1861, created by section 91 the offence of felonious receiving, limiting it to cases of property which had been and was known by the receiver to have been obtained (whether by stealing or not) under circumstances which amounted to felony at common law or under that Act. By a separate section, section 95, a new misdemeanour was created of receiving property which had been and was known by the receiver to have been obtained (whether by stealing or not) under circumstances which amounted to misdemeanour under the Act of 1861. Under the law as it stood between 1861 and 1916 there were thus two separate statutory offences chargeable under different sections of the Act of 1861 and a common law misdemeanour of receiving stolen property, the stealing of which was not a felony either at common law or under the Act of 1861. It is, we think, plain from the wording of sections 91 and 95 of the Act of 1861, first, that to constitute the offence of felonious receiving it was necessary to show that the receiver knew that the property received had been feloniously obtained and that to constitute the statutory misdemeanour of receiving the receiver knew that the property had been obtained under circumstances amounting to a misdemeanour, and secondly, that it was sufficient in either case to show that he knew that the property came within the general category of property with which the respective sections dealt; it was not necessary to show that he knew by what specific felony or by what specific misdemeanour the property had been obtained. We think that subsection (1) of section 33 of the Larceny Act, 1916, did no more than to re-enact in a single section provisions corresponding to those of sections 91 and 95 of the Larceny Act, 1861.

We are therefore of opinion that where property has been obtained under circumstances which amount to misdemeanour it is still sufficient under section 33 (1) of the Larceny Act, 1916, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained under circumstances which do in law amount to misdemeanour; and that it is unnecessary to prove that he knew that the property was obtained under circumstances which amount in law to the specific misdemeanour by which they were in fact obtained. On the other hand, it is not merely sufficient to prove that the receiver knew that the property fell into the wider category of

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property which has been dishonestly obtained, for that is equally consistent with an erroneous belief that the property was obtained in circumstances which amount to felony and consequently falls short of establishing that degree of knowledge of the general category into which the property fell which we feel compelled to hold is an essential ingredient of the offence charged.

Similarly, where property has been stolen or obtained under circumstances which amount to felony, it is sufficient, and it is also essential, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained under circumstances which do in law amount to felony, but it is unnecessary to prove that he knew that the property was obtained under circumstances which amount in law to the specific felony by which it was in fact obtained. But, although this is sufficient to establish an offence of felonious receiving under section 33 (1) of the Larceny Act, 1916, more specific knowledge is required where property has in fact been stolen and it is desired, for the purpose of proving guilt, to adduce evidence of guilty knowledge of the receiver of the kind referred to in section 43 (1) of the Act. This evidence (that is, of other stolen property having previously been found in his possession and of previous convictions for dishonesty) is admissible only in the cases where property has been stolen and the receiver knows that it has been stolen. To make such evidence admissible the receiver must be charged with knowing the property to have been stolen and not obtained in any other way, even under circumstances which amount to felony.

It follows that in the present case the justices were right in holding as a matter of law that it was not sufficient to show that the accused knew that the goods were obtained by some dishonest means. The prosecution must go further and adduce evidence to show that he knew that they were obtained in circumstances which do in law amount to misdemeanour as opposed to felony. The justices were wrong, however, in supposing that it was necessary for the prosecution to adduce evidence to show that the accused knew the precise nature of the misdemeanour by which the property was in fact obtained.

This brings us to the second question, whether in the present case there was any evidence to show that the accused in fact possessed the requisite degree of knowledge, and in this connexion to the Crown's contention that the doctrine of recent possession entitled the justices to infer, in the absence of any explanation by the accused, that he had knowledge of the true facts in which the property was obtained by Mrs. Honey.

It may, we think, be misleading to speak of the "doctrine" of recent possession in cases of receiving. It is a convenient way of referring compendiously to the inferences of fact which, in the absence of any satisfactory explanation by the accused, may be drawn as a matter of common sense from other facts, including, in particular, the fact that the accused has in his possession

property which it is proved had been unlawfully obtained shortly before he was found to be in possession of it.

The so-called "doctrine of recent possession" is not limited to cases of receiving nor to inferences as to the accused's knowledge or state of mind. The right inference from recent possession may be that the accused himself has stolen the property, as where he is found in the street near the scene of the house-breaking in possession of the property which has been taken from the house which has been entered. On the other hand, where property has been stolen and there is nothing in the circumstances to point to the accused's having himself committed the crime of stealing, the proper inference from its being found in his possession may be that he received the property knowing, not merely that it had been unlawfully obtained, but knowing that it had been stolen. Such an inference is justified by the fact that by far the commonest way in which property is unlawfully obtained is by stealing. But, conversely, where property has been obtained under circumstances which amount to misdemeanour, the inference cannot be drawn from its being found in his possession that he knew that it had been obtained in this much less common way as opposed to having been stolen. There may, however, in such a case be facts proved additional to the fact of recent possession which entitle the court to draw the inference that the accused knew the true facts as to the circumstances in which the property was unlawfully obtained, as where there is evidence of some association between the receiver and the person who obtained the goods, from which it might be inferred that the receiver was in the confidence of the other person, and knew what he had in fact done.

But the inference appropriate to the particular facts proved is not a presumption of law; it is merely an inference of fact drawn by applying common sense to the proved facts, and there is no "doctrine" that in a receiving case where recent possession on the part of the accused is proved he is presumed, in the absence of evidence to the contrary, to have known the true facts of the way in which the goods were obtained.

In the present case there was no evidence of any association between the accused and Mrs. Honey before he bought the refrigerator, or between that date and the date when he bought the television set. There was ample evidence that he knew that the goods had been obtained by dishonest means, and had the goods in fact been stolen and not obtained under the circumstances amounting to a misdemeanour there would, for the reasons we have already indicated, have been a case to answer on the charge of receiving them knowing them to have been stolen. But the facts proved against the accused are precisely those facts from which in so many cases a receiver's knowledge that goods had been stolen is rightly inferred, and we see nothing in the evidence from which the justices could infer that the accused knew that the property had been obtained in circumstances

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amounting to a misdemeanour as opposed to having been stolen. There was thus no evidence of what we have regretfully held to be an essential ingredient of the offences with which the accused was charged, namely, knowledge by him that the property which he received fell within the category of property which had been obtained in circumstances which amount to misdemeanour. This appeal must therefore be dismissed.

We should have been glad to have been able to come to a different conclusion, for this case illustrates the difficulty with which the prosecution is faced upon a charge of receiving where the goods have in fact been obtained by a misdemeanour such as false pretences. It seems the height of absurdity that the receiver should have committed no offence if he erroneously thought that the goods had been obtained by the graver crime of stealing; but, although it is the first time that the matter has come before the court, this appears to have been the law since the offence was first created in 1861, and if the matter is to be remedied, as we for our part think it should, only Parliament can do so.

Appeal dismissed.

Solicitors: *Director of Public Prosecutions; J. H. Fellowes.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

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Nov. 4, 21.

In re HASTINGS (No. 2).

Lord Parker C.J., Hilbery and Diplock JJ.

Habeas Corpus—Criminal cause or matter—Successive applications—Refusal of application by Queen's Bench Divisional Court—Application renewed to Queen's Bench Divisional Court differently constituted—Based on same evidence and same grounds—Whether court entitled to entertain application—Applications to different judges of same Division—Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 2—*Habeas Corpus Act,* 1816 (56 *Geo.* 3, *c.* 100), *ss.* 3, 6—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 63.

An applicant for a writ of habeas corpus in a criminal cause or matter, who has once been heard by a Divisional Court of the Queen's Bench Division, cannot be heard again, on a renewed application made on the same evidence and the same grounds, by another Divisional Court of the same Division, as the decision of the Divisional Court is equivalent to the decision of all the judges of the Queen's Bench Division.

Quaere, whether an applicant has a right to apply successively from judge to judge of the same Division, other than during the vacation.

In re Cobbett (1845) 5 L.T.O.S. 130 applied.

Dicta of Lord Halsbury in *Cox* v. *Hakes* (1890) 15 App.Cas. 506, 514; 6 T.L.R. 465; *Eshugbayi Eleko* v. *Officer Administering the*

Government of Nigeria [1928] A.C. 459; 44 T.L.R. 632; and dicta of Denning L.J. in *Ex parte Chapple* (1950) 66 (Pt. 2) T.L.R. 932, 936 questioned.

APPLICATION for writ of habeas corpus.

On July 25, 1957, the applicant, Edward Thomas Hastings, was convicted at Liverpool Crown Court on each count of an indictment containing five counts to which he had pleaded Not Guilty. The first count charged him with felony, larceny as a bailee, while the other counts were for misdemeanours, counts two, three and four charging false pretences and count five fraudulent conversion. Separate verdicts were returned in respect of each count.

The recorder, passing sentence, said: "Edward Thomas Hastings, you have been convicted on the plainest evidence of "deliberate, calculated and systematic frauds. Those frauds "have not only affected companies well able to sustain loss but "have cruelly brought grave financial burdens on little men "which it will be difficult for them to bear. This is by no means "the first time you have been convicted of dishonesty. You are "a menace to the integrity and health of the commercial com-"munity. You will go to prison for four years' corrective "training."

The recorder did not say "concurrent on each count" and the sentence endorsed on the indictment was merely "four years' "corrective training." That was also the sentence entered on the calendar for the session of the court and on the warrant of commitment sent to the Governor of Walton Prison where the applicant was detained.

The applicant was given leave to appeal against conviction to the Court of Criminal Appeal in respect of the first and two other counts. On December 18, 1957, his appeal was heard and in the result the count for felony was quashed, the appeal in relation to the two other counts being dismissed. There was no alteration in the sentence. Pearson J., who gave the judgment of the court, stated expressly that, although leave to appeal against sentence had not been asked for, the sentence was in the view of the court reasonable and there would be no reason for interfering with it on any view.

The applicant applied for a writ of habeas corpus directed to the governor of Walton Prison and to the Home Secretary on the ground, inter alia, that only one general sentence had been passed on him and that, since the conviction on the first count had been quashed, there was no lawful sentence upon him in existence and he was not lawfully detained.

The application was heard by a Divisional Court consisting of Lord Goddard C.J., Streatfeild and Slade JJ. on March 7, 1958,[1] but the writ was refused, the court holding that, as a matter of

[1] [1958] 1 W.L.R. 372; [1958] 1 All E.R. 707.

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construction, the words used by the recorder amounted to concurrent sentences of four years' corrective training on each count and that accordingly the quashing of one count had no effect on the sentence which remained a valid sentence. The applicant appealed from that decision to the Court of Appeal who refused to entertain the appeal on the ground that it arose in a criminal cause or matter in which they had no jurisdiction.[2]

On October 24, 1958, the applicant made a fresh application for the writ (on this occasion directed to the Governor of H.M. Prison, Wandsworth, where he was then detained), to a Divisional Court consisting of three different judges, it being contended that he had the right to go from judge to judge and from one Divisional Court of three judges to another Divisional Court of three different judges. The court, being of opinion that there was an arguable point, gave leave to move but subject to the court being satisfied that they had jurisdiction to hear and were bound to hear a fresh application. The fresh application was made on exactly the same grounds and on the same evidence as in the previous application.

On November 4, 1958, the Solicitor-General took objection to the hearing of the fresh application by the Divisional Court on the ground that it had no jurisdiction to do so.

Neil Butter for the applicant.

Sir Harry Hylton-Foster Q.C., S.-G. for the Governor of the prison.

The following cases were cited in argument: *Ex parte Partington*[3]; *Cox* v. *Hakes*[4]; *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*[5]; *The State (Dowling)* v. *Kingston (No. 2)*[6]; *Secretary of State for Home Affairs* v. *O'Brien*[7]; *In re Carroll.*[8]

The following Dominion cases were also cited: *Ex parte Byrne*[9]; *Re Bowack*[10]; *Ex parte Rowlands*[11]; *Rex* v. *Carter*[12]; *Re Baptiste Paul (No. 2)*[13]; *Rex* v. *Jackson*[14]; *Rex* v. *Gee Dew.*[15]

Cur. adv. vult.

November 21. LORD PARKER C.J. The judgment which I am about to read is the judgment of the court, in the preparation of which we all collaborated.

In these proceedings Mr. Butter moves for a writ of habeas corpus to bring up the body of one Edward Thomas Hastings, at

[2] The Times, July 29, 1958.
[3] (1845) 13 M. & W. 679.
[4] (1890) 15 App.Cas. 506; 6 T.L.R. 465.
[5] [1928] A.C. 459; 44 T.L.R. 632.
[6] [1937] I.R. 699.
[7] [1923] A.C. 603; 31 T.L.R. 639.
[8] [1931] 1 K.B. 104.
[9] (1883) 22 N.B.R. 427.
[10] (1892) 2 B.C. 216.
[11] (1895) 16 N.S.W.L.R. 239.
[12] (1902) 5 Can.Cr.Cas. 401.
[13] (1912) 7 D.L.R. 25.
[14] (1914) 15 D.L.R. 545.
[15] (1924) 3 D.L.R. 153.

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present detained in Wandsworth Gaol undergoing a sentence of four years' corrective training, with a view to his being discharged. The ground of the application is that no valid sentence has ever been passed on him. [His Lordship stated the facts and continued:]

The Solicitor-General has contended first that, contrary to what has been generally presumed, an applicant has never had a right to go, as it is said, from judge to judge except when the court is not sitting. Secondly, and in the alternative, that though prior to the Judicature Act, 1873, an applicant could go from court to court, for example, from the Court of Queen's Bench to the Court of Common Pleas, yet, at any rate since 1880, when by Order in Council the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court were fused, an applicant who has been to a Queen's Bench Divisional Court has exhausted his rights in regard to all the judges of the Queen's Bench Division.

It is undoubtedly assumed today to be the law that an applicant for a writ of habeas corpus in a criminal matter—and we are only dealing with criminal matters—can apply to every judge in turn. In *Cox* v. *Hakes*,[1] one of the leading authorities on habeas corpus, Lord Halsbury L.C. said[2]: "For a period "extending as far back as our legal history, the writ of habeas "corpus has been regarded as one of the most important safe-"guards of the liberty of the subject. If upon the return to that "writ it was adjudged that no legal ground was made to appear "justifying detention, the consequence was immediate release "from custody. If release was refused, a person detained might "—see *Ex parte Partington*[3]—make a fresh application to every "judge or every court in turn, and each court or judge was bound "to consider the question independently and not to be influenced "by the previous decisions refusing discharge." Again, in the more recent case before the Judicial Committee of *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*,[4] Lord Hailsham L.C. said[5]: "If it be conceded that any judge has jurisdiction "to order the writ to issue, then in the view of their Lordships "each judge is a tribunal to which application can be made "within the meaning of the rule, and every judge must hear the "application on the merits. It follows that, although by the "Judicature Act the courts have been combined in the one High "Court of Justice, each judge of that court still has jurisdic-"tion to entertain an application for a writ of habeas corpus in "term time or in vacation, and that he is bound to hear and "determine such an application on its merits notwithstanding that "some other judge has already refused a similar application."

Further, in *Ex parte Chapple*,[6] Denning L.J. said: "In the

[1] (1890) 15 App.Cas. 506; 6 T.L.R. 465.
[2] 15 App.Cas. 506, 514.
[3] (1845) 13 M. & W. 679, 684.
[4] [1928] A.C. 459; (1928) 44 T.L.R. 632.
[5] [1928] A.C. 459, 468.
[6] (1950) 66 (Pt. 2) T.L.R. 932.

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"year 1679, when the writ of habeas corpus was given its modern "efficiency, Parliament conferred the power of issuing it, not "only on the judges of the King's Bench, who had theretofore "issued it, but also on the Lord Chancellor, the Lord Keeper, "the judges of the Common Pleas, and the Barons of Exchequer. "Indeed, section 10 of the Habeas Corpus Act, 1679, provides: "'That it shall and may be lawful to and for any prisoner and "prisoners as aforesaid, to move and obtain his or their habeas "'corpus as well out of the High Court of Chancery or Court of "'Exchequer, as out of the Courts of King's Bench or Common "'Pleas or either of them'; so that in those days a subject could "apply to any of the superior courts of the realm to issue a writ "of habeas corpus. Not only was the subject entitled to apply "for the writ, but the judges themselves were obliged to issue it in "proper cases and were subject to severe penalties if they did not "do so. If any court or judge refused to issue it, the applicant "had no right to appeal to a higher court, but he could go from "court to court and from judge to judge without being met by a "plea of res judicata."

The Solicitor-General, however, points out that the views of Lord Halsbury L.C.[7] and of Denning L.J.[8] were expressed obiter, and that the case of *Eleko*,[9] though persuasive authority, is not binding on this court. He accordingly asks us to look at the matter afresh.

We think that it is clear that, at any rate since the end of the eighteenth century, an applicant has always had the right to apply successively to every tribunal competent to issue a writ of habeas corpus. The problem thus involves ascertaining first what tribunals had that power before the passing of the Judicature Act, 1873, and, secondly, upon what tribunals that power has devolved as a result of that Act and its successors, in particular, the Judicature Act, 1925.

In considering the early history of the matter it is relevant to bear in mind that the common law courts of King's Bench, Common Pleas and Exchequer functioned as courts only in term time, and that each of the four legal terms was of brief duration. Consequently, the greater part of the year fell during the legal vacations, although the judges of the courts might be sitting under commissioners of assize, oyer and terminer and general gaol delivery or hearing cases in Middlesex at nisi prius. Furthermore, each of the common law courts sat in banc and no individual judge of the court had any general power to act for the court. Even a decision at nisi prius only became a judgment of the court upon motion to the court upon the fourth day of the term next following the verdict at nisi prius.

The position prior to the passing of the Habeas Corpus Act, 1679 is far from clear. It is noteworthy, however, that in the statute 16 Car. 1, c. 10, it was provided as follows: "That if any

[7] 15 App.Cas. 506, 514.
[8] 66 T.L.R. (Pt. 2) 932, 936.
[9] [1928] A.C. 459.

" person shall hereafter be committed, restrained of his liberty, " or suffer imprisonment, by the order or decree of any such " court of Star-Chamber, or other court aforesaid, now or at any " time hereafter, having, or pretending to have, the same or like " jurisdiction, power or authority, to commit or imprison as " aforesaid, or by the command or warrant of the King's " Majesty, his heirs or successors, in their own person, or by " the command or warrant of the council board, or of any of the " Lords or other of His Majesty's Privy Council, that in every case " every person so committed, restrained of his liberty, or suffering " imprisonment, upon demand or motion made by his counsel, " or other imployed (sic) by him for that purpose, unto the judges " of the Court of King's Bench or Common Pleas, in open court " shall, without delay, upon any pretence whatsover, for the " ordinary fees usually paid for the same, have forthwith granted " unto him a writ of habeas corpus, to be directed generally " unto all and every sheriffs, gaoler, minister, officer, or other " persons in whose custody the party committed or restrained " shall be, and the sheriffs, gaoler, minister, officer, or other " person in whose custody the party so committed or restrained " shall be, shall at the return of the said writ, and according to " the command thereof, upon due and convenient notice thereof " given unto him, at the charge of the party who requireth or " procureth such writ, and upon security by his own bond given, " to pay the charge of carrying back the prisoner, if he shall be " remanded by the court to which he shall be brought, as in like " cases hath been used, such charges of bringing up and carrying " back the prisoner to be always ordered by the court, if any " difference shall arise thereabout, bring or cause to be brought " the body of the said party so committed or restrained unto and " before the judges or justices of the said court from whence the " said writ shall issue, in open court, and shall then likewise " certify the true cause of such his detainer or imprisonment, and " thereupon the court, within three court-days after such return " made and delivered in open court, shall proceed to examine " and determine whether the cause of such commitment appear- " ing upon the said return be just and legal, or not, and shall " thereupon do what to justice shall appertain, either by deliver- " ing, bailing, or remanding the prisoner; and if any thing shall " be otherwise wilfully done or omitted to be done by any judge, " justice, officer or other person aforementioned, contrary to the " direction and true meaning hereof, that then such person so " offending shall forfeit to the party grieved his treble damages, " to be recovered by such means, and in such manner as is " formerly in this Act limited and appointed for the like penalty " to be sued for and recovered."

The reference is always to the judges sitting as a court and an open court and not to them as individual judges. This was an Act to extend the right to the writ of habeas corpus, not to diminish the rights to it previously enjoyed by the subject. If

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before the passing of this Act the subject had had any recognized right to apply to each individual judge in turn or to an individual judge without having to apply to the judges sitting as a court, it is difficult to suppose that the Act would have been framed in the terms in which we find it enacted.

The Court of King's Bench unquestionably had the power to issue the writ of habeas corpus ad subjiciendum in criminal and supposed criminal matters in term time. It appears from the judgment of Blackstone in *Wood's* case [10] that the Court of Common Pleas had by 1679 successfully asserted a similar general power, originally by making use of the legal fiction that the applicant was a party to a current suit in the Common Pleas, a fiction that was dropped after the passing of the Habeas Corpus Act, 1640. The Court of Exchequer had not, by 1679, acquired any general power to issue the writ, but made use of it in the case of persons genuinely privileged to be sued only in the Court of Exchequer. There appears to be no trace, however, of any of these courts exercising the power to issue the writ except in term time and upon motion to the court sitting in banc.

According to the views of Coke and of Hale the writ could issue out of Chancery in term time or in vacation, although Lord Nottingham L.C. in *Jenkes's* case [11] took the contrary view, a decision which has been described as being the cause of the passing of the Act of 1679.

The Act of 1679 was a procedural Act. It applied only to persons detained for criminal or supposed criminal matters and was directed specifically to the abuse of detaining persons in prison without bail and without bringing them to trial. So far as is relevant to the present inquiry it did two things which had much wider consequences: (1) by section 10 it provided that in criminal or supposed criminal matters the High Court of Chancery and the Court of Exchequer as well as the Courts of King's Bench and Common Pleas should have power to issue the writ of habeas corpus ad subjiciendum; and (2) by section 2 it provided that in criminal or supposed criminal matters any judge of those courts could, in vacation, act for the court of which he was a member, and if upon return of the writ he found the case was bailable, release the prisoner on his recognizances to take his trial in the Court of King's Bench the term following, or at the next assize sessions or general gaol delivery to be held in the place where the offence of which the prisoner was charged was cognizable.

The powers conferred by this Act upon single judges were thus limited in three respects, first as to the type of case in which they could be exercised, namely, criminal and supposed criminal matters, secondly, as to the powers of the judge, namely, to bail the prisoner, and thirdly, as to the time in which they could be exercised, namely, in vacation.

[10] (1761) 2 Black.W. 744.

[11] (1676) 6 Howell's St.Tr. 1190, 1196.

It seems that by the middle of the eighteenth century the first two limitations upon the powers of a single judge had ceased to operate in practice. By 1758 the Court of King's Bench treated the writ of habeas corpus as issuable, in all cases not merely criminal and supposed criminal cases, by a single judge in vacation, and the power of the judge upon the return as extending to discharging and not merely to bailing the prisoner. (See *Rex* v. *Shebbeare*,[12] *Rex* v. *Mead*,[13] *Rex* v. *Clark*.[14]) This was no doubt a natural extension of the statutory power, since if the judge on the return of the writ in a supposedly criminal case was to find that it was not a criminal case and that the detention was unlawful it would not be consonant with the libertarian views of common lawyers in the eighteenth century that the prisoner should not be ordered to be discharged.

The Habeas Corpus Act, 1816, gave statutory recognition to these extensions of the powers of a single judge in vacation which had already been adopted by the Court of King's Bench and extended them to judges of the Common Pleas and the Exchequer. It also gave these judges and their respective courts in term time the power to inquire into the truth of the return. It did not apply to the Court of Chancery which was slower to assert the general power to issue writs of habeas corpus except as authorized by the Act of 1679, but in *Crowley's* case [15] in 1818 Lord Eldon, after an elaborate examination of the history of the matter, held that the Lord Chancellor had the general power to issue writs of habeas corpus in term or in vacation.

But while the limits on the powers of a single judge of the common law courts granted by the Act of 1679 were in these two respects swept away by the practice of the King's Bench Court in the eighteenth century and finally by the Act of 1816, there is no suggestion that we can find in the cases or the writings of lawyers that the third limitation, namely, that a single judge could issue the writ in vacation only was ever impinged upon. Thus in Chitty's Criminal Law, 1826, 2nd ed., vol. 1, p. 124, it is stated that it "must be obtained by motion "to the court in term time, and by application to a judge in "vacation." The practice is also so stated in the judgment of Abbott C.J. in *Hobhouse's* case.[16] We think it is established that in term time the writ was issuable only by the court sitting in banc. Except in vacation a single judge had no power to do so.

There is no doubt that in term time an applicant could go from court to court, that is, from King's Bench to Common Pleas, from Common Pleas to Exchequer, from Exchequer to Chancery, and it may well be that in vacation he could go from judge to judge even of the same court. But it appears clear that he could not apply twice to the same court on the same facts, for while the decision whether or not to issue a writ of habeas

[12] (1758) 1 Burr. 460.
[13] Ibid. 542.
[14] (1758) 1 Burr. 606.
[15] (1818) 2 Swan. 1.
[16] (1820) 3 B. & A. 420, 422.

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corpus is not a judgment so that there is no res judicata it is not a writ of course (*Hobhouse's* case [16]) and the decision whether or not to issue it involves the exercise of a judicial discretion. The court must have an inherent jurisdiction to refuse, having once exercised its discretion, to hear the same matter argued again. Thus in *In re Cobbett* [17] an application had been refused by the Court of Queen's Bench and again by the Court of Exchequer. It was then made a second time to the Court of Exchequer when Parke B. in the course of the argument said [18]: "You have been heard once: we cannot enter into this matter "again."

The common law courts, as we have already mentioned, prior to the Judicature Act, 1873, sat in banc, all members of the court available in London sitting together although there might on occasions be absentees. But the decision was the decision of the court, and there is no suggestion to be found in any of the cases that the absence of one or more members would enable an applicant to apply again to the same court when it was differently constituted.

What then is the historical foundation for the dictum of Lord Halsbury in *Cox* v. *Hakes*? [19] He refers to *Ex parte Partington*,[20] in which an application for the writ had been refused by the Court of Queen's Bench. The application was renewed before and refused by the Chief Baron, and was then renewed before the Court of Exchequer. Parke B., in giving the judgment of the court refusing the application, said this [21]: "The defendant, "however, has a right to the opinion of every court as to the "propriety of the imprisonment, and therefore we have thought "it proper to examine attentively the provisions of the statute "[i.e., under which the applicant was in custody] without con- "sidering ourselves as concluded by these decisions. But we are "all of opinion that the defendant is not entitled to his discharge, "and we entirely agree in the judgment of the Court of Queen's "Bench, which was approved of by the Chief Baron, and are "satisfied of the correctness of the reasons stated to us to have "been assigned by Lord Denman for that judgment."

Parke B., therefore, was only expressly affirming the right to go from one court to another. That the application to the Chief Baron was made in vacation is not expressly stated, but it was anyhow made in chambers, and in view of what we have already indicated as to the practice, we think it reasonably certain that it was made in vacation. In the report of the case in 9 Jurist, however, there appears an interjection of Pollock C.B., to whom the previous application had been made in these words [22]: "Yes, "and of every judge," meaning that a person is entitled to take the opinion of every judge, This interjection is quite consistent

[16] 3 B. & A. 420, 422.
[17] (1845) 5 L.T.O.S. 130.
[18] Ibid.
[19] 15 App.Cas. 506, 514.
[20] 13 M. & W. 679; (1845) 9 Jurist. Vol. 1, p. 92.
[21] 13 M. & W. 679, 684.
[22] 9 Jurist, Vol. 1, pp. 92, 93.

with its being a reference to what might take place in vacation, and we think that it must have been so intended.

In re Cobbett [23] was decided in the same year. In the course of that case, in addition to the observations to which we have already referred, Parke B. said [23]: "You can go to another "court in which you have not been heard. I believe this matter "has been heard in the Queen's Bench as well as here, but as it "is an application for a habeas corpus, you are entitled to the "judgment of each court and of each judge; and therefore you "may go to the Court of Common Pleas. If this was the only "court in which you could be heard we might then, perhaps under "the circumstances, rehear the case."

There is here the only other pre-Judicature Act reference that we can find to an applicant's being entitled to the judgment of each judge, but here again, Parke B. may be referring only to the time when the court is not sitting.

In *Cox* v. *Hakes* in the Court of Appeal under the title *Ex parte Cox*,[24] Lord Esher M.R. said [25]: "It was argued that, if "such an appeal lies, a prisoner would be deprived of the privi- "lege which he had under the old practice of applying, where his "application for a habeas corpus was refused by one judge, to "all the other judges in succession. It is not correct to say that "under the old system there could be an application to all the "judges in succession. There could be an application to all "the courts in succession." It is true that the decision of the Court of Appeal was reversed by the House of Lords,[26] but none of their Lordships dissented from Lord Esher's statement, unless it be Lord Halsbury in the observations to which we have already referred.[27] It is to be observed that neither Lord Bramwell nor Lord Herschell subscribed to Lord Halsbury's observations. Lord Bramwell said [28]: "However, as has been said, we have got on "without such appeals hitherto, and might continue to do so and "thrive. I say 'without such appeals,' for, with all respect, I "cannot agree that going first to a judge of one court, and then, "on being refused by the judge, going to a court, and, on being "refused by one court, going to another, was or is an appeal. "The court applied to after refusal by a judge or other court "was not exercising an appellate jurisdiction in entertaining the "application. It was exercising a primary jurisdiction. It need "not have heard of the former application, nor known of the "materials on which it was founded; and, indeed, those before "it might be different from the former. If, indeed, such a "proceeding was an appeal that appeal exists still. Clearly, "where the first application is to a single judge, and where to the "High Court, the Lord Chancellor could grant the writ refused "by them on application to him, and vice versa. Whether if one "division of the High Court, before the Queen's Bench, Common

[23] 5 L.T.O.S. 130.
[24] (1887) 20 Q.B.D. 1.
[25] Ibid. 13.
[26] 15 App.Cas. 506.
[27] Ibid. 514.
[28] Ibid. 523, 524.

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" Pleas, and Exchequer Divisions were fused, had refused the " writ, then another Division would have been bound to entertain " an application for one, I know not. If yes, then the Judicature " Act left the matter as it was before. Anyhow, there is the " possibility of a second application now as of right, so that there " is the less need for an express appeal to supply the want of " being able to try more than one tribunal."

Lord Herschell said [29]: " It will be convenient, before pro- " ceeding to an examination of the section of the Judicature Act " upon which this case turns, to state briefly the mode in which " the courts have administered the law in relation to that writ. " It was always open to an applicant for it, if defeated in one " court, at once to renew his application to another. No court " was bound by the view taken by any other, or felt itself obliged " to follow the law laid down by it. Each court exercised its " independent judgment upon the case, and determined for itself " whether the return to the writ established that the detention " of the applicant was in accordance with the law. A person " detained in custody might thus proceed from court to court " until he obtained his liberty. And if he could succeed in con- " vincing any one of the tribunals competent to issue the writ " that he was entitled to be discharged, his right to his liberty " could not afterwards be called in question."

Lord Watson agreed with Lord Bramwell and Lord Herschell, and Lord Macnaghten agreed with Lord Herschell. Lord Field, who dissented, said [30]: " In support of this argument it was " correctly stated, as some of the noble and learned Lords who " have addressed your Lordships have already pointed out, that " at the time of the passing of the Act it was the undoubted right " of a subject detained in custody to question by habeas the law- " fulness of his detention before every one of Her Majesty's courts " in succession, without regard to the refusal to discharge by any " one or more of them; and that if any one court came to the " conclusion that the applicant was entitled to be discharged, no " other court had any power of modification or reversal."

It is all the more noteworthy that their Lordships confined themselves in this way to the right of going from court to court, having regard to their experience prior to the Judicature Act. Lord Bramwell had been a Baron of the Court of Exchequer from 1856, Lord Esher had been a justice of the Court of Common Pleas since 1868, and Lord Field had been a justice of the Court of Queen's Bench.

Again, in *Secretary of State for Home Affairs* v. *O'Brien*,[31] Lord Birkenhead says [32]: " In the course of time certain rules " and principles have been evolved; and many of these have been " declared so frequently and by such high authority as to become " elementary. Perhaps the most important for our present " purpose is that which lays it down that if the writ is once

[29] 15 App.Cas. 506, 527, 528.
[30] Ibid. 543.
[31] [1923] A.C. 603, 31 T.L.R. 639.
[32] [1923] A.C. 603, 609.

"directed to issue and discharge is ordered by a competent court. "no appeal lies to any superior court. Correlative with this rule, "and markedly indicative in itself of the spirit of our law, is that "other which establishes that he who applies unsuccessfully for "the issue of the writ may appeal from court to court until he "reaches the highest tribunal in the land."

So far we venture to think that the authorities cannot be said to support the principle that except in vacation an applicant could go from judge to judge as opposed to going from court to court. Nor can we trace any single instance in the books of application being made to successive judges of the same court. The only real authority to the contrary appears to be *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*,[33] to which we have already referred. Two considerations seemed to have influenced the Judicial Committee in that case: (1) that it would be curious if an applicant could by reason of the Act of 1679 renew his application before each judge in vacation, whereas in term he could make it once to the Court of Chancery and once to each of the three courts of common law. We have dealt with the historical evidence in its favour, but is this so curious? An applicant is entitled to the opinion of the full court. In vacation he cannot obtain that and so he was given the right to go from judge to judge. (2) That since by reason of the Judicature Act, 1873, there is only one court, the Supreme Court of Judicature, an applicant by reason of that Act would only be able to make one application, namely, to the Supreme Court, unless he also had the right to go from judge to judge.

This second reason brings us to an examination of the Judicature Acts, but before doing so we would mention that in *The State (Dowling)* v. *Kingston (No. 2)*,[34] there is to be found a most illuminating judgment of FitzGibbon J. (with whom Sullivan C.J. agreed) which considers *Eleko*[35] in great detail and gives we think cogent reasons for thinking that Lord Hailsham may have gone too far in that case.

The Judicature Act, 1873, by section 3, united into one Supreme Court of Judicature the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer and other courts not relevant to the present matter. By section 16 the jurisdiction of all these courts and the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by all or any one or more of the judges of those courts sitting in court or chambers or elsewhere, was transferred to the High Court of Justice. There was thus transferred to the High Court of Justice any jurisdiction to issue writs of habeas corpus previously vested in the common law courts and in the individual judges of those courts. Section 23 provided that, subject to the Act and rules made thereunder the transferred jurisdiction should

[33] [1928] A.C. 459.
[34] [1937] I.R. 699.
[35] [1928] A.C. 459.

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be exercised as nearly as maybe in the same manner as it might have been exercised by the respective courts from which the jurisdiction had been transferred. Section 26 abolished the division of the legal year into terms, and gave the High Court power to sit at any time. Provisions for vacations and sittings in vacation were made by sections 27 and 28, but the new vacations unlike the old were not periods during which the common law courts were not in general able to function. Section 31 set up five divisions of the High Court, namely, Chancery, Queen's Bench, Common Pleas, Exchequer and Probate, Divorce and Admiralty; but section 32 authorised the Queen in Council to order the reduction or increase in the number of divisions. It was under this power that the three common law divisions were combined into a single Queen's Bench Division by Order in Council in 1880.*

Section 39 conferred upon single judges of the High Court such jurisdiction as was previously exercisable by single judges of the former common law courts and such other jurisdiction of the High Court as might be directed or authorized to be so heard by Rules of Court, while section 40 provided that such causes and matters as were not proper to be heard by a single judge should be heard by Divisional Courts. Further, by section 41 it was provided as follows: "Subject to any rules of court and in the meantime "until such rules shall be made, all business belonging to the "Queen's Bench, Common Pleas, and Exchequer Divisions "respectively of the said High Court, which, according to the "practice now existing in the superior courts of common law "would have been proper to be transacted or disposed of by the "court sitting in banc, if this Act had not passed, may be transacted and disposed of by Divisional Courts, which shall, as "far as may be found practicable and convenient, include one "or more judge or judges attached to the particular Division of "the said court to which the cause or matter out of which such "business arises has been assigned;".

At this stage therefore the position was that subject to any rules of court a single judge of the Queen's Bench Division sitting in court or chambers could exercise in relation to writs of habeas corpus any jurisdiction which could formerly have been exercised by a single judge of any of the three common law courts, while a Divisional Court of each of the three common law divisions could exercise the jurisdiction of the former common law courts sitting in banc. The effect of the Order in Council in 1880 was that the Queen's Bench Division became the successor of the three Courts of Queen's Bench, Common Pleas and Exchequer sitting in banc, the only differences being that any two or more judges sitting as a Queen's Bench Divisional Court should constitute and be the court sitting in banc. That being so, we think that after 1880 an applicant for habeas corpus who had been heard by a Queen's Bench Divisional Court and refused, if he

* Order in Council for Reducing the Number of the High Court of Justice, etc., December 16, 1880.

applied again to a Queen's Bench Divisional Court upon the same evidence was in the same position as an applicant before 1873 who made a second application to the same common law court, and could be met with the objection with which the applicant was met in *In re Cobbett*[36]: "You have been heard "once: we cannot enter into this matter again."

The Judicature Act, 1925, did not re-enact the express provisions of section 41 of the Act of 1873 as to the powers of the former common law courts sitting in banc being exercisable only by Divisional Courts. Section 63, however, provided that Divisional Courts might be held for the transaction of any business in the High Court ordered by rules of court to be heard by a Divisional Court and that Divisional Courts for the purpose of the matters to be heard by them should exercise all or any part of the jurisdiction of the High Court which included all the jurisdiction formerly exercised by the three common law courts. Finally, by R.S.C., Ord. 59, rr. 1 and 14, the jurisdiction of the High Court in relation to habeas corpus was directed to be exercised either by a single judge or by a Divisional Court.

We do not think that this altered the position of a Queen's Bench Divisional Court when sitting to hear applications for habeas corpus. It still is the successor of the three common law courts sitting in banc, its decision is equivalent to the decision of all the judges of the division just as the decision of one of the old common law courts sitting in banc was the equivalent of the decision of all the judges of that court.

We know of no case since 1880 in which an application based on the same grounds and the same evidence has been renewed before a Divisional Court consisting of different judges of the Queen's Bench Division. Nor are there to be found any dicta in support of the making of such an application unless it be in *Ex parte Chapple*[37] in which Denning L.J. said[38]: "The only "remedy of the subject is to go before another Divisional Court "or another judge. . . ." It may be that he was referring to a Divisional Court of another Division, but if he meant a Divisional Court of the Queen's Bench Division consisting of different judges we think that he was wrong.

We hold, therefore, that the applicant, having already once been heard by a Divisional Court of the Queen's Bench Division, is not entitled to be heard again by another Divisional Court of the same Division.

That is sufficient to dispose of the present case. Although it has been necessary for the purpose of ascertaining the nature of the jurisdiction exercised today by the Divisional Court in matters of habeas corpus to canvass the historical justification for the view expressed by the Judicial Committee in *Eleko's* case,[39] it is not necessary for the decision of the present application for us to express any concluded opinion as to the extent

[36] 5 L.T.O.S. 130.
[37] 66 (Pt. 2) T.L.R. 932.
[38] Ibid. 936.
[39] [1928] A.C. 506.

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of an applicant's right today to go from judge to judge as distinct from going from Divisional Court to Divisional Court of the Queen's Bench Division. *Eleko's* case [39] has remained unquestioned—except in the Irish case [40] to which we have referred—for 30 years, and there are parallel decisions in Canadian and Australian courts. In a matter so important to the liberty of the subject we would not lightly disregard the principles there laid down and their correctness can be left for consideration until a case arises in which they are directly in point.

We would only repeat, in conclusion, what Lord Goddard has so often said, that there should be an appeal to the House of Lords in criminal matters where the writ of habeas corpus has been refused. This case is just the case in which a ruling by the highest tribunal in the land is required.

Application dismissed.

Solicitors: *Official Solicitor*; *Treasury Solicitor.*

E. M. W.

[39] [1928] A.C. 506.

[40] *The State* (*Dowling*) v. *Kingston* (*No. 2*) [1937] I.R. 699.

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